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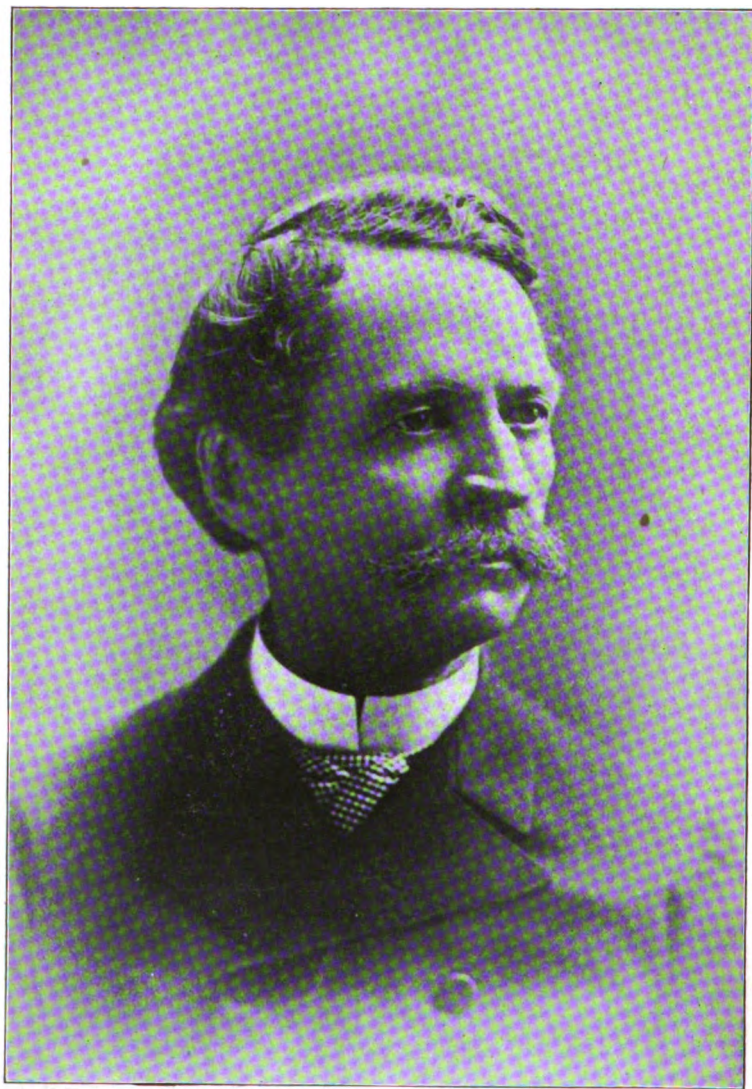
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## COKE AND BACON: THE CONSERVATIVE LAWYER, AND THE LAW REFORMER.<sup>1</sup>

Sir Edward Coke used to say: "If I am asked a question of common law, I should be ashamed if I could not immediately answer it; but if I am asked a question of statute law, I should be ashamed to answer it without referring to the statute books."

If any one ever knew all about the common law, Coke was undoubtedly the man. With a constitution that was proof against illness and fatigue, with a memory that never relaxed its grasp, he gave to the study of the common law all his available time and energy, from his youth until he died in extreme old age. His learning, vast but not varied, began and ended with the common law, for which he entertained feelings of reverence amounting to fanaticism. He said that there were rules of the law for which no reason could be given; a circumstance that in his eyes clothed them with a mysterious sanction, and conferred on them an additional value. A mere dry legist, he cared more for the six carpenters than he did for the seven sages of Greece. Pos-

<sup>1</sup> This is a portion of an admirable address delivered by Hon. U. M. Rose, of Arkansas, before the Virginia Bar Association, at its last meeting at Old Point Comfort. The remaining portion, relating to Codification, which  
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better fits the title under which the address was delivered and first printed, "The Present State of the Law," will be printed in a future number of this REVIEW.—[EDS. AM. L. REV.]

sessing not the slightest tincture of general literature, scorning all foreign systems of law, as well as the philosophy of law in general, which he considered to be matters wholly irrelevant and speculative, he was perfectly at home with executory devises, contingent remainders, shifting and springing uses, and all the other technical creations of the law of tenures, which made up a great part of the common law. One could easily fancy that he lisped of these things in his cradle, and that they peopled his dreams in later life. They were to him as household words; and he knew all of their playful ways and cunning habits. Few men could say as much; for that kind of learning was extremely technical and difficult; and Coke's pre-eminence in this respect was universally conceded. Chance and circumstance had had much to do with the development of the law of tenures; but selfishness and perversity had operated to render it so artificial and intricate that many of its complications tasked or eluded the most highly trained intellects; a fact of which Coke at one time furnished a most striking illustration.

It is well known that Coke was consumed with ambition and with avarice. Twice he increased his estate by rich marriages; and the emoluments derived from his practice were so great that, by the time he got to be chief justice of the Court of King's Bench, he was one of the largest land owners and one of the wealthiest men in England. Hoping after his downfall that, through the influence of the King's favorite, he might be restored to power and position, he forced his daughter to marry Sir John Villiers, the brother of the Duke of Buckingham, preparatory to which union he drew up a settlement by which he settled a large estate on the ill-sorted couple. Of course such documents were closely scrutinized; and the all-powerful and intriguing family of Buckingham must on this important occasion have had the aid of as good lawyers and conveyancers as could be found; but when, years after the death of Coke, the terms of the settlement were spelled out with the labor that is required to decipher an Assyrian tablet, it was discovered, to the surprise and admiration of lawyers deeply versed in the technical learning of feudal tenures, that the title to the estate, after performing various unexpected and extraordinary feats, had at last vested in fee

simple in the right heirs of Sir Edward Coke; where it still remains.<sup>1</sup>

It is needless to say that Coke was not a reformer. His object was to perpetuate, and not to change. Indeed, reform was not the order of the day. It is difficult for us now to picture his immediate surroundings. All the English-speaking people in the world in his time did not equal the present population of the State of New York; and London, a town of the Middle Ages, dim, dingy, unlighted, uncared for, with its picturesque contrasts between royal pageantry and squalid poverty, contained at that time probably not more than 300,000 inhabitants, crowded down close to the river under the shadow of the Tower. The irregular and badly paved streets, the rows of ancient houses in every stage of decay, whose monotony was broken here and there by a church or a residence of more pretensions, presented a prospect that was not suggestive of impending change. Things were much as they were in the days of the Plantagenets; and they would probably so continue. As a lawyer, the owner of many broad acres, and with such surroundings, it was not surprising that Coke should favor the established order of things.

If we look back to the Elizabethan period, we shall find that the connection then existing with antiquity was close and intimate. Whoever was educated at all could read Homer and Plato in the original, and could speak Latin, the common medium of communication between persons of cultivation all over the world. A slavish adulation of antiquity was the most prominent feature of the civilization of the age. There was a prevailing bigotry on the subject that could only be compared with the ancestor worship of the Chinese. Pierre la Ramee, a contemporary of Coke, a scholar, a virtuous and an honorable man, was persecuted all his life, and was finally assassinated, because he ventured to dispute some of the theorems of Aristotle. Giordano Bruno, the friend of Sir Philip Sidney, who visited England when Bacon was a student at Gray's Inn, and whom Bacon must have known, followed in the footsteps of la Ramee, and suffered a like fate. He has left on record his opinion of the course of teaching then

<sup>1</sup> For an explanation of the method by which this was done, see 2 Wash. Real Prop. 294.

in use in the English universities. "Rhetoric, or rather the art of declamation," he said, "is their whole study; and all the philosophy of the universities consists of a purely technical knowledge of the *Organon* of Aristotle; and for every violation of its rules a fine of five shillings is imposed."<sup>1</sup>

Outside of theological writings, where there was an occasional mention of the millennium, and outside of the writings of Bacon, there was never any expression of hope as to the future of our race; not even in the writings of Shakespeare, in which almost everything else can be found. The work of the world seemed to have been done, and Time to be leaning on his scythe. Scholastics still continued languidly their war of words. Nowhere did the spell of antiquity lie heavier upon the minds of men than in England. We have the most abundant evidence of the fact that the spoken language of the time differed only very slightly from that which we speak to-day; but the written language was commonly so affectably archaic that if Coke or Bacon or Selden had given a written order for a dozen of eggs from a neighboring grocer's, he would have done so in language such as was used two hundred years before.

Coke was a tall, fine-looking, handsome man — a man of imposing aspect, strong in body, strong in mind. His form and features have been so happily preserved for us by the art of the painter, his character has been so clearly portrayed by contemporaries, that we seem to see him, as he appeared as attorney-general on his way to Westminster to browbeat Raleigh, or to bully some other hapless prisoner, who was denied the benefit of counsel, and who, single-handed, could ill withstand the torrent of vituperation and abuse which was poured out on him by the prosecution; or again as he appeared on his frequent way to the Tower to examine prisoners subjected to torture. On such occasions he walked very erect, with an air of extreme self-reliance bordering on arrogance. A vigorous, pompous man that never deflated; masterful and abounding in resources; he was dogmatic, proud, revengeful, aggressive, rude, dictatorial, peremptory, cruel, obstinate, unforgiving and tyrannical; a man far better suited to excite fear than love. A terrible reminder of him is extant in several volumes

<sup>1</sup> Giordano Bruno par Christian Bertholmess, Paris, 1846, p. 102.

of examinations of prisoners taken "before torture, during torture, between torture, and after torture," amid what cries and howlings we know not, all in his well-known handwriting.

Coke was unquestionably a man of distinguished ability, and of great learning in his particular specialty; but as he thus passed along the streets of London and Westminster, he often met two men so immensely superior to himself in point of intellect as to render comparison absurd; two men each of whom has formed an epoch in the history of human thought: Shakespeare, of whose life we know almost nothing, and Bacon, of whose life we know too much. One of these he hated, the other he despised.

It is quite impossible that Coke should not have known Shakespeare by sight; though it is extremely improbable that he ever spoke to one whom he regarded as an idler and a reprobate, and whose manuscripts he would gladly have tossed in the fire. His custom, when he became chief justice of the Court of King's Bench, was to charge the grand juries that all players should be punished as vagrants; that is, that they should be placed in the stocks, and whipped from tithing to tithing. Yet this man, who had probably never seen a play, was not a Puritan; he was only by nature hard, stern, unimaginative and austere; a man of the type of the unbending Pharisee. For this and for many other reasons Coke has received but little mercy at the hands of lay historians and biographers. As he never spared others, so they have not spared him. Macaulay, in speaking of Coke's marriage with his second wife, Lady Hatton, rejoices to know that "she did her best to make that bad man as miserable as he deserved to be."<sup>1</sup> His great enemy, Bacon, appreciated the value of her services. When he came to die, he left her a legacy in his will.

With lawyers Coke has fared far better than with laymen. He was not altogether a bad man, as Macaulay would have us believe; and if we had to make a critical estimate of his character, we should be compelled to vote on him by sections. He was

"——— like the toad, which, ugly and venomous,  
Wears yet a precious jewel in its head."

<sup>1</sup> Essay on Bacon.



One of the things that is most highly prized by lawyers is an able, learned, unbiassed, fearless and independent judiciary; having the qualities that Coke undoubtedly possessed, as conceded by his enemies, and even by Bacon himself.

One of his odious characteristics was his extreme pedantry; for he was the greatest pedant of a pedantic age. When, after having been chosen speaker of the House of Commons, he was presented at the bar before Queen Elizabeth for her approbation, he began his address in this delicate and pleasing vein: —

“As in the heavens a star is but *opacum corpus* until it hath received light from the sun, so stand I *corpus opacum*, a mute body, until your highness’ bright shining hath looked upon and allowed me.”

Much more followed of the same sort. Why it was that the earth did not immediately open and swallow him up is a mystery that has never been satisfactorily explained.

But we lawyers remember another scene in which Coke appeared to more advantage — a moment when he nobly cast to the winds the honors and emoluments of office, and all the benefits to be derived from royal favor, at a time when royal favor and royal resentment were well-nigh omnipotent. When James I., called in those days the “Solomon of the North,” having resolved to finish the work of subjecting the English people to slavery, so nearly accomplished by the Tudors, and having the twelve judges on their knees before him, asked them whether in the future they would not refuse to decide anything adverse to the royal prerogative, upon which eleven of them answered in a chorus “Yes;” in that critical juncture Sir Edward Coke, forgetting to chop Latin, and talking as good Anglo-Saxon as ever yet man spoke, answered with sublime simplicity, and in words that are immortal: “When the case happens I shall do that which shall be fit for a judge to do.” We remember too, how, when obsequious deference to kingly power was almost universally prevalent, after years of striving against adverse circumstances, he at last got through the Parliament that “Petition of Rights” which finally stayed the exactions of the Stuarts, and placed English liberty upon an imperishable foundation. Remembering these things, remembering also that Coke’s is still

the greatest name in the history of our jurisprudence, that he has been quoted a hundred times where any other judge or law writer has been quoted once, recalling also the fine expiatory discipline of Lady Hatton, — we are disposed to forgive him all his sins.

Coke, who had resolved to know nothing but the law, and the common law at that, and Bacon, who had taken all knowledge for his province, seemed to have been born to be enemies. Coke often scoffed at the wide and miscellaneous learning of Bacon, who in his turn was exasperated by the narrowness and bigotry of Coke. It was not difficult to make an enemy of Coke; but Bacon was an agreeable person, learned, witty, wise, an entertaining and instructive companion, a forcible and persuasive speaker, by temperament bland, affable, charitable, liberal and conciliatory. Excepting Coke it would seem that he never hated anybody; but the gratuitous insults and contumely publicly and repeatedly bestowed on him by Coke finally stirred up in him a sentiment of hatred that was foreign to his tolerant nature, a feeling of hostility that afterwards never slept. They were rivals in everything, even in love — if a headlong steeplechase for the hand of a rich widow can be called by that name; and neither of them ever asked for quarter, or made the slightest concession. History hardly presents another example of individual hostility so deeply seated, so unremitting, so long continued. No feud of the Capulets and the Montagues or of the Guelphs and the Ghibelines ever developed more ill-will. It seems a pity that these two extraordinary men should have been contemporaries; for without the other either might have had all the wealth and honors to which they both aspired with all the zeal which ambition and avarice could breed. As it was, their antagonism embittered and blasted the life of each. It was largely through the influence of Bacon that Coke was stripped of the ermine, and consigned to the Tower, where he had been times without number to see the rack and the thumb-screw applied to the helpless victims of the law. The gloomy structure must have had a strangely familiar look to him when the huge iron doors closed upon him. But his day of triumph came when he helped to drag Bacon from the woolsack, and to stamp on his brow the indelible mark of infamy.

It has been said that every man is, consciously or unconsciously, a follower of either Aristotle or of Plato; but Bacon was not a disciple of either. With that fine comprehensive glance which enabled him to dispose of a whole system in a few words, he said that Plato subordinated the universe to thought, while Aristotle subordinated it to words. With Bacon the universe stood not solely for either intellect or for logic; but every phenomenon required a separate and an unbiased study for itself. Only by the evidence of the senses, painfully and laboriously employed in every possible direction, could the secrets of the sphinx be discovered. Bacon was the first and the greatest of the moderns. Without assistance he closed the record of the past, and raised the curtain upon the modern world. The phrase "the interpretation of nature" was invented by him to denote a process seemingly the most obvious of all; but which was the last thing thought of. Of all the ancients he most closely resembled Socrates, who had indeed told men that their generalizations were based on no accurate knowledge. But Socrates confined the field of his inquiries to questions of intellect and of morals; by which unfortunate limitation he delayed the progress of civilization for more than two thousand years.

In 1592, when Bacon was thirty-one years of age, he proposed in the House of Commons a plan to amend, consolidate and condense the whole body of English laws, to reduce them in bulk, to simplify them in form, and to render them consistent, leaving out all repetitions and whatever was obsolete.

Coke, who was nine years older than Bacon, and was also in Parliament at that time, was in the plenitude of his powers, and had almost reached the meridian of his fame. No proposition could have been made to which he would have been more averse. Coming from anyone it would have been odious; coming from Bacon it was detestable. Everything was a mystery in those days, even the making of shoes and hats; and it was due to the dignity of the law that it should be the greatest of all mysteries. In the good olden time its mystery had been properly guarded and preserved, because legal proceedings were recorded in law Latin which Cicero could not have read, or in law French which no living Frenchman of woman born could understand; but now,

in a less reverent and more iconoclastic age, such proceedings were required to be preserved in English, which was only rescued from vulgarity by many technical terms borrowed from other languages, and by a peculiar and antiquated phraseology. The proposition to deprive the law of the last vestige of clothing, and thus to expose it naked to the laughter of its enemies, was no less sacrilegious than indecent. The simplification of the law would be the undoing of it, since no one would respect what every one could understand. The English constitution would be overturned, life would lose its sweetness, chaos would come again, and death would be the only refuge. We may be sure that Coke said something about the rash presumption of inexperienced youth. He probably concluded by denouncing Bacon as an enemy of mankind and a traitor to his country.

In this contest the odds were greatly in favor of Coke; a fact which he knew full well. As a scholar in politics Bacon excited a certain amount of distrust, which was enhanced by the novelty of his proposition. As a politician Coke was immeasurably his superior. Long afterwards Bacon, looking back over his career, said of himself that he was better suited to hold a book than to play a part. In an extremely conservative age the precedents of centuries weighed heavily against him. Nothing of the sort had been tried since the compilation of the old Byzantine codes, of which but few legislators had ever heard. In this respect, as in many others, Bacon was very far ahead of his age. Had he succeeded, the evolution of our law would have been wholly changed; and English jurisprudence, instead of lagging behind the continental systems, would have led the van in the march of reform. In England his effort fell still-born; but it attracted marked attention abroad, and served to accelerate the development of the law in alien lands.

Bacon, great as he was, was in no sense a universal genius, as he has sometimes been pictured in imagination. Never, save in fancy, did the universal genius exist. Outside of the sphere of his genius, Bacon was shorn of his strength, and was like unto other men. Though he had the flight of an eagle, yet he always skimmed along close to the surface of the earth. He tried his power in architecture, both theoretically and practically; but the

results were unqualified failures; and his metrical translations of the Psalms must always take rank along with the worst specimens of poetry ever produced in our language. He had unbounded genius for whatever is practical; but farther his genius did not go. Curiously enough, the civilization which he projected, wonderful beyond conception, partakes largely of all of his defects. As the law is, or ought to be, above all things practical, it was strictly within his domain. He had not the marvelous technical knowledge of the common law that made of Coke an oracle in his profession; but he possessed a comprehensive insight into the spirit, adaptability and philosophy of jurisprudence which Coke could never have acquired.

So thoroughly conscious was Bacon of the necessity of the work for which he had endeavored to obtain the sanction of Parliament, that he afterwards resolved to carry it out as an individual enterprise. In his "Proposal for Amending the Laws of England," addressed to James I., he showed that he had thoroughly matured his scheme, and that he contemplated nothing revolutionary. "I dare not advise," he said, "to cast the law into a new mould. The work which I propound tendeth to pruning and grafting the law, and not to plowing it up and planting it again; for such a remove I should hold indeed for a perilous innovation."

This great work, which might have been the crowning glory of almost any lifetime, was never to be accomplished. Bacon spoke of it in his last years regretfully as a work that required assistance, and that he had been compelled to forego. The failure has been a loss irreparable; for no one that ever lived was better qualified for such a task than Bacon. It seems strange that in his busy life, animated by such extensive designs, filled with so many vicissitudes, he should have formed this plan so early and should have brooded over it so long. Bacon's capacity for labor was something marvelous. During the four years that he was chancellor he cleared off the long arrears of Ellsmere, and passed judgment in 36,000 cases, though during that period he presided over the House of Lords, was active in all affairs of State, participated in all kinds of social functions, and added largely to his voluminous writings, most of which were

translated into Latin, either by himself or by others under his supervision. From early manhood he was a frequent debater in Parliament, and until he ascended the bench he was engaged in an extensive practice in the courts; so that, although it might seem that his printed writings would exhaust the labors of a lifetime, yet they represent but a small part of the work that he performed; hence it is only matter for surprise that he accomplished as much as he did.

Though the more important works of Bacon were published in Latin in order to render them everywhere current among scholars, yet they were very soon translated into several modern languages, so that they might be made accessible to a still larger circle of readers. They produced a profound impression; but their scope was not fully understood; and it cannot be said that they were received with much favor. Church and State remained attached to the old moorings; and the bar, always conservative save where a principle of public liberty is involved, adhered rigidly to the methods of Coke. The great majority of scholars were blindly, fanatically attached to the old order of things. Outside of a very small circle of personal friends, such as Sir Henry Wotton and Hobbes of Malmesbury, it is doubtful whether Bacon, up to the time of his death, had made a single convert; and the subsequent progress of his doctrine was slow, being achieved in spite of many obstructions. When Dr. Johnson, a little more than a hundred years ago, spoke of the study of science as being derogatory to the higher faculties of the mind, he echoed the sentiment of a great majority of his countrymen. Newman said that, even in his time, Oxford was a mediæval university.<sup>1</sup> It is only within the last twenty or thirty years that the Baconian philosophy can be said to have attained to a definite triumph; and even now a belated combatant occasionally fires a random shot at the advancing column; but no damage is done, and the incident is soon forgotten.

Bacon is the only great and radical reformer who was not at the same time an ardent propagandist. Judging from the effect of his teachings, the man that fired the Ephesian dome was but a

<sup>1</sup> *Apologia pro vita sua*, p. 149.

timid conservative compared to him; but he promised no Utopia, and besought no man to enlist under his banner. Indeed, so frequent and impressive was his advice against a rash acceptance of any novel doctrine, that it may almost be questioned whether he himself did not entertain misgivings as to the beneficial effects to be anticipated from the tremendous mine that he was engaged in planting under the venerable bastions of antiquity. Convinced that everything is experimental, and that caution should preside where the issues are uncertain and are so immense as to affect the entire future of humanity, he said: "It were good therefore that men in their innovations would follow the example of time itself, which indeed innovateth greatly, but quietly, and by degrees scarce to be perceived;" and he recommended that "novelty, though it be not rejected, yet be held for a suspect." But it is difficult to believe that when he said in his last will, "For my name and memory I leave it to men's charitable speeches, and to foreign nations, and to the next age," — he did not anticipate the final success of a revolution compared with which all other revolutions were only the dust of the balance.

It would require volumes to recount the triumphs of utilitarian science founded on the philosophy of Bacon, including all the inventions and discoveries of modern times, which constitute the theme of common declamation. Doubtless the debt we owe to him exceeds all of our powers of computation; but it is not possible to make a gain in one direction without a corresponding loss in some other. If Bacon really had any misgivings as to the ultimate effects of his teachings, events have proved that his fears were not wholly without foundation; for the countless victories of science have failed to bring to our race that spirit of peace and contentment, rarer even than happiness itself, which has been the dream of the wise and the good ever since the world began. While we boast of our increasing knowledge, we must confess that our progress has raised up social questions that seem to defy solution, and that threaten to overturn the framework of society; that the present age is in profound revolt against ills of life that seem to be incurable, and that were formerly borne almost without complaint; and that the con-

stantly increasing complexities of modern life tend continually to make of existence a more deadly and desperate struggle.

If it would be difficult to count up the debt that we owe to Bacon, it is equally impossible to compute what we have lost. A hundred years ago one of the first judges of the Supreme Court of the United States spoke of the Scotch philosophy of Thomas Reid as being as great a discovery as the discoveries made by Sir Isaac Newton. But alas for the mutability of things, the philosophy of Thomas Reid interests the present generation no more, while all the other systems of philosophy from Thales to Comte and Schöpenhauer are drifting out of sight. It is a subject worthy of reflection that these tremendous derelicts, embodying the speculations of many of the greatest minds that ever lived concerning the faculties, the surroundings, the origin and destiny of man, hardly produce a ripple in the current of modern thought.

If one should spend his life in counting, weighing and classifying grains of sand in a valley, he would, no doubt, in the course of time acquire a wonderful dexterity in that pursuit; but he would hardly possess a fit conception of the beauty and grandeur of the outline of the surrounding hills. "The business of the poet," said Imlac in *Rasselas*, "is to examine, not the individual, but the species; to remark general properties and large appearances; he does not number the streaks of the tulip, nor describe the different shades in the verdure of the forest."

No; he deals not with minute details and sundries; and in an age of details and sundries we have eliminated the poet. If Bacon planted the seeds of a revolution that overturned the work of Coke, he has rendered another Shakespeare impossible. Not by the aid of parliamentary grant or congressional appropriation, nor by the organization of gigantic corporations, can the sacred muse be wooed back to a world which she has deserted. The legitimate drama has been banished from the stage, or returns only after long intervals to revisit the scenes of her former triumphs. Barren as were the Middle Ages in most fields of thought and action, yet they brought forth new types of architecture that have been found worthy to take their place along-



side of the immortal creations of Greece and Rome; while we, in the way of originality, only succeed in producing hideous sky-scraping structures that, as seen from the surface of the moon, cast their long, black, revolving shadows over the neighboring houses and streets. If at times we display great interest in the arts of painting and sculpture, it is mostly of the kind that is got up to order; but of that exquisite sense of the beautiful that made the illiterate Athenian multitude the finest art critics that the world has ever seen, we have not a trace; and in the absence of it we pin our faith to the guide-books. Our literature, made up now almost wholly of works of fiction, is nearly as ephemeral as the publications of the amateur writers of stories in the daily papers. At intervals of a few months some novel is acclaimed as immortal, by enthusiasts that could not tell the name of it a year later.

The eloquence of the statesman has degenerated into the rant of the demagogue. Chrisostom and Savanarola, Bossuet and Massillon, Stillingfleet and Wesley and Whitfield, sleep in their hallowed tombs, and have left no successors. It would be a pleasant thing for us to have at the bar such men as Erskine and Curran and Webster and Pinkney; but the age does not produce them, and we get along the best we can without them. It was said long before Napoleon that there is but one step from the sublime to the ridiculous; but in an age in which we have become painfully conscious of the limitations of our powers, the ridiculous has gradually encroached on the sublime until there is only a fading line between them; and in deadly and constant fear of crossing it, we timidly take refuge in the commonplace. Music itself, heavenly maid, of all the fine arts the oldest, the most faithful and the tenderest friend of man, she who has soothed and comforted his sad heart in every time of sorrow ever since the morning stars sang together, is said by some to be undergoing a like eclipse.

This also was in our destiny. Wonderful as are the advantages that we have derived from the scheme of Bacon for the improvement of mankind, yet it cannot be denied that in some respects our adoption of it has been like the second eating of the forbidden fruit. This was the inevitable consequence of his

teachings, the sum and substance of which was that we should put lead on our wings; that we should no more be led by sentiment, nor seek the inaccessible, nor dally with the vague and the undefined. And we have kept the faith; and are keeping it more and more strictly as the years go by, with more and more emphatic results. It is only the other day that Professor Goldwin Smith declared that if he lives a few years longer he expects to see the last poet, the last horse, and the last woman; three things that will certainly be missed. A little reflection would have convinced him that the last poet has already passed by.

These are things that we cannot help. Though we may sometimes look regretfully to the past, as Schiller looked back to the Gods of Greece, or as Mary of Scotland gazed on the receding shores of France, yet our way is onward; and we shall never more be content to sit down by the deserted hearthstones of our ancestors. Perhaps hereafter some genius as original as Bacon, and equally unheralded, shall reveal to men some better way that is now hidden from our eyes.

If the law in its higher aspects has failed in its development in respect of harmony, or symmetry, or unity, or facility of being understood, that result has been reached through causes that Bacon distinctly pointed out and repeatedly warned us against. Although he recommended the closest, most analytical and most discriminating scrutiny of individual instances, thereby opening the door to infinite diversity, yet he urged, in the most impressive manner, that through this diversity, by means of arrangement, co-ordination and scientific classification, we should re-establish unity and harmony and symmetry, on larger, truer and more intelligible foundations; a process not applicable to poetry and the fine arts, which were not within his scheme, but one which is, above all things, applicable to the law.

No one was ever so great a destroyer as Bacon; but he did not destroy for the sake of destruction; but only for the purpose of building again with lasting materials on a more secure basis. Everywhere he inculcated the necessity of classifying and organizing all facts of external observation, not only with a view to the preservation of knowledge, but also with a view to

facilitate the making of new discoveries, looking also possibly to that unification of knowledge, which, up to this time, remains no more than a pleasing dream.

It might have been supposed that the law, being largely experimental, and naturally adjusting itself easily to comprehensive rules, would have offered the most obvious and inviting field for the exhibition of the theories of Bacon; but his teachings have had perhaps less effect on English law than on any other science. The practice of reporting individual cases, which he found established, was an anticipation, to some extent, of his methods of critical inquiry as to individual instances; but the legal profession rejected his doctrine of careful classification and constant and scrupulous revision upon every new accession of knowledge. It is, however, a safe prediction that his doctrines, triumphant in all other fields of inquiry, must eventually prevail in English and American law also, the most intractable of all materials yet encountered.

With his greater singleness of purpose, Coke was enabled to accomplish, though in a very different way, a task that Bacon was compelled to forego. Though not the author of the English system of reporting, he brought the art to a degree of perfection never before attained, and rarely reached in latter times; he gave to the office of reporter a new dignity and importance; while in his commentaries upon Littleton he covered the whole field of English law as it then existed. His reverence for antiquity prevented him from discriminating between things in full force and things obsolescent and things obsolete; and hence he devoutly preserved every technicality that was anywhere imbedded in the law; thus hampering legal development along the lines of natural justice and equity, and raising up that large and influential body of lawyers, who, adhering always to the strictest letter of the law, made a fetish of every conceivable technicality; lawyers who rendered perpetual homage to the deified Quibble; who shuddered at the thought of an erasure in a deed; who were ready to go into convulsions at a suggestion to amend a pleading; and who seemed really to believe that the universe would some day be derailed and destroyed by a misplaced comma.

There is no doubt but that Coke's work was and remains a

colossal monument of labor and industry. He was the Moses that led the profession out of the wilderness of the year-books, the abridgments, the unwritten, the confused and undefined customs. Before this, the law was but poorly understood, or was not understood at all; but Coke flattered himself that, with his commentaries, which offered a short road to knowledge, a man might hope to attain to some acquaintance with the common law after the lucubrations of twenty years; a saying that must have filled the hearts of the students of the Inner Temple with exceeding joy.

When the crowning edifice of the common law was thus made complete, Bacon had already set at work the forces that were to effect its demolition. The common law established a lay and ecclesiastical hierarchy reaching from the serf to the throne. The political fabric was mortised and riveted together in every possible way. The penal laws were hardly less bloody than those of Draco. The feudal system of land laws, with its fantastic complications, its oppressive exactions, afforded a striking example of the culmination of aristocratic misrule. Though the institution of chivalry, now an object of universal derision, had struck the first blow in her interest, woman, by the common law, remained a slave from her cradle to her grave. In short, there was some reason for saying that the law, as it then existed, was "the result of the blundering and chicanery of several generations that in legal language is called the wisdom of the age."

The common law possessed, however, one virtue that redeemed many sins. It was instinct with that political liberty that was born and nurtured among the tribes that lived in the shadows of the great oaks of Germany for ages before Tacitus placed their simple customs in contrast with the meretricious manners of Imperial Rome.

But whatever its virtues or faults may have been, it was not endowed with the permanence which the rigidity of its structure gave to it in the eyes of Coke. The chancellor was already engaged in smuggling into the country the equitable principles of the civil law, which were at a later day to filter into the common law courts until the whole lump should be leavened; and the new civilization, starting into life at the voice of Bacon, was

to render the affairs of life so varied and complex as to make the common law system wholly inadequate to the wants of men.

What Bacon desired was that Parliament should enter upon a career of cautious, prudent and enlightened law reform. The work of Coke was conceived in a different spirit; but his name as a jurist was so great, his accuracy so surprising, that his summing up of existing law acquired an authority almost as absolute as that of a legislative enactment. They were both great men, and great lawyers; but their methods were essentially different. Coke had all the qualities of a great judge, and Bacon had all the qualities of a great judge except the indispensable virtues; one was the greatest of reformers, the other belonged to the ranks of the most extreme conservatism.

## CONTRACTS OF FOREIGN CORPORATIONS.

A corporation cannot migrate and exercise its functions and powers in a State different from that of its creation, except with the express or implied consent of such State. As a corollary to this proposition, a State can prohibit, or admit upon conditions, a foreign corporation to do business and exercise its powers within its limits. This general statement is subject to certain exceptions which it is not necessary to mention here.

Nearly all, if not all of the States, have constitutional provisions or statutes prescribing conditions upon which foreign corporations are allowed to do business therein. The conditions usually prescribed are, that the foreign corporation shall file a copy of its charter or certificate of incorporation, and a statement of its assets and liabilities, together with a certificate appointing an agent upon whom service of process may be made, in the office of the Secretary of State or other public officer in the State. The statutes of some of the States merely prohibit foreign corporations from doing business therein without complying with the conditions named, and do not declare what the consequences of a failure to comply therewith shall be; in other States the statutes not only prohibit foreign corporations from doing business without complying with the statutory requirements, but also provide a pecuniary penalty for a violation thereof, while in a few of the States statutes exist declaring that the contracts of foreign corporations which have not complied with the local law shall be void, invalid, or unlawful, as the case may be.

There is a great conflict of judicial opinion upon the effect of these different statutory and constitutional provisions upon the contracts of foreign corporations which have not complied therewith. In those States having statutes providing conditions upon which foreign corporations are allowed to do business, without stating what the consequences of a failure to observe the same

shall be, it is generally held that the contracts of foreign corporations which have not complied with such statutes are void and unenforceable. The courts adopting this view base their decisions upon the principle that a contract prohibited by law is illegal and void, and upon the further ground that there must be an intent on the part of the legislature that the contract shall be void, for otherwise there would be no means of enforcing obedience to the law. In a few of the States, however, having statutes of the character just mentioned, it is held that the contracts are not void, and that the State only can complain of the violation of the law. In States having statutes providing conditions upon which foreign corporations may do business, and denouncing a penalty for a violation thereof, it has been generally held that the contracts of a foreign corporation which has not complied with the law are not void, but that the only consequence of a violation of the statute is the incurring of the penalty provided. This is the view adopted by the Supreme Court of the United States in the case of *Fritts v. Palmer*.<sup>1</sup> There are other States having statutes of the kind just mentioned in which it is held that such contracts are void, because a contract prohibited under a penalty is unlawful and void. The courts adopting this last mentioned view seem to find, in the provision of the law declaring a penalty, additional evidence of a legislative intent that such contract shall be void. In those States having statutes containing express declarations that such contracts are void, invalid, or unlawful, as the case may be, it is held that the contracts are void to all intents and under all circumstances.

An analysis of these various conflicting decisions would fail to develop any general principle or rule for the construction of statutes of the kind under consideration. There are two propositions, however, upon which the authorities generally agree, viz.: first, that the statutes should be given such effect as the legislature intended; and second, that it is not the primary object and purpose of these statutes to prevent foreign corporations from doing business in the domestic State; but that the primary

<sup>1</sup> 132 U. S. 282.

purpose of such a statute is to furnish a convenient means for the service of process, and subjecting foreign corporations to the jurisdiction of the courts of the domestic State, and to place within the reach of the citizens of such State, knowledge of the powers, personnel, financial standing and responsibility of foreign corporations doing business therein. Another proposition of importance in determining the effect of these statutes upon such contracts is, that the contracts are not contrary to public policy in the sense that the courts will not enforce them on that ground. It is true that the legislature is presumed to have a policy in view in the enactment of any public statute, and that a contract prohibited by statute is contrary to the policy influencing the enactment of such statute. But where a statute is designed for the benefit and protection of individuals who are *sui juris*, as distinguished from intending to promote and secure objects of public interest, or morality, a defense to a contract made in violation thereof, based upon considerations of public policy, will not prevail. The statutes under consideration are intended for the benefit and protection of individuals entering into contracts with foreign corporations, and no matter of public interest is at stake. In the absence of statute the contracts of foreign corporations are valid and enforceable upon the principle of comity. In those States having statutes providing conditions upon which foreign corporations are allowed to do business, and prescribing a penalty for violation thereof, it is held by the weight of authority, that the contracts of such corporations, which have not complied with the law, are not void. The decisions adopting this view certainly recognize that such contracts, although prohibited, are not against public policy. The courts which hold that contracts of foreign corporations which have not complied with the local law are void do not, as a rule, base their decisions upon considerations of public policy, but hold such contracts void upon the principle that a contract prohibited by statute is illegal and void, or on the theory that such contract should be held void as a penalty for the violation of the law. The fact that, in the absence of statute, such contracts are treated as valid and enforceable, and that in those States having statutes providing conditions upon which foreign corporations



may do business therein, such corporations are authorized to make contracts upon compliance with the requirements of the statute, argues conclusively that the contracts are not contrary to public policy, and are not so considered by the legislatures of the several States.

Jessel, M. R., in the case of *Printing &c. Company v. Sampson*,<sup>1</sup> says: "It must not be forgotten that you are not to extend arbitrarily these rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts."

It is a well established principle of the common law that where a contract is prohibited by statute it is illegal, and it is generally said that such contracts are void. It does not follow, however, that every contract which is prohibited by statute is unenforceable under all circumstances. Where a contract is prohibited by statute, and such statute is intended for the protection of the individual citizen, as distinguished from declaring a rule of public policy, a party may waive the right to take advantage of the statute and plead the invalidity of the contract as a defense, or by his conduct may estop himself from so doing. When a contract is not contrary to public policy, or *malum in se*, but is merely *malum prohibitum*, a party cannot retain the benefits of such contract and at the same time repudiate it,—he cannot affirm and disaffirm,—he cannot, in the language of Lord Mansfield, "use the statute which is intended as a shield, as a sword." Where a party has accepted and made his own the benefit of a contract, he has estopped himself from denying in court the validity of the instrument by which those benefits came to him.<sup>2</sup>

In the application of this principle it is immaterial that the statute declares the contract void. The Statute of Frauds declares that a contract for the sale of real estate which is not

L. R. 19 Eq. 465.

<sup>2</sup> 2 Pars. Contr. 790.

in writing is void; but nevertheless where such contract has been partly executed, it will be enforced. The statute declares that a conveyance made with intent to hinder, delay and defraud creditors shall be void. Where, however, the creditor, the person such statute is intended to benefit and protect,—has received a dividend or any other benefit or advantage from such conveyance, he is estopped from questioning its validity. A judgment or decree of a court rendered without jurisdiction is void; but a person who has accepted benefits under such decree cannot afterwards deny its validity. “Where a party has availed himself of an unconstitutional law, he cannot, in a subsequent litigation with others, not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit.”<sup>1</sup> In this case it is also stated: “The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the Statute of Limitations, it is a conservator, and without it society could not well go on.”<sup>2</sup>

Mr. Justice Cooley, in the case of *Beecher v. Marquette & Pacific Rolling Mill Co.*,<sup>3</sup> says: “Courts often speak of acts and contracts as void when they mean no more than that some party concerned has a right to avoid them; legislators sometimes use language with equal want of exact accuracy; and when they say that some act or contract shall not be of any force or effect, mean perhaps no more than this: that at the option of those for whose benefit the provision was made it shall be voidable, and have no force or effect as against his interests. \* \* \* If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while if the manifest intent is to give protection to determinate individuals who are *sui juris*, the purpose is sufficiently accomplished if they are given the liberty of avoid-

<sup>1</sup> *Daniels v. Tierney*, 102 U. S. 415.

<sup>2</sup> *Ibid.*

<sup>3</sup> 45 Mich. 103.

ing it. A statute would strike blindly if the letter alone were to be regarded, not the spirit."

Mr. Justice Dewey, in the case of *Allis v. Billings*,<sup>1</sup> uses the following language: "The term 'void,' as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from 'voidable;' it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms 'void' and 'voidable,' in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term 'void' can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification."

Chief Justice Ryan, in the case of *Bromley v. Goodrich*,<sup>2</sup> says: "Probably no words are more inaccurately used in the books than *void* and *voidable*. Statutes not unfrequently declare acts void, which the tenor of their provisions necessarily makes voidable only."

The decisions are numerous in which the term "void" as used in the statutes has been construed to mean "voidable" only.

It is now the generally accepted doctrine of modern authority that where a party has entered into a contract with a corporation which is *ultra vires* in the sense that the same is beyond the powers of the corporation, and therefore in violation of the express or implied prohibition of the statute, and has received benefits thereunder, he cannot retain the benefits and at the same time defend against the enforcement of the contract on the ground that it is *ultra vires*. The courts generally speak of *ultra vires* contracts as void; but notwithstanding this they still regard and give effect to the principles of estoppel and waiver which prevent a party from asserting their invalidity when it would be inequitable and unjust to rely upon such defense. Mr. Sedg-

<sup>1</sup> 6 Metc. (Mass.) 417.

<sup>2</sup> 40 Wis. 139.

wick, in his work on Statutory and Constitutional Law,<sup>1</sup> says: "It must be fully borne in mind that the invalidity of contracts made in violation of statute is subject to the equitable exception that, although the corporation in making the contract, acts in disagreement with the charter, where it is a simple question of capacity or authority to contract, arising either on the ground of regularity of organization or of power conferred by the charter, the party who has had the benefit of the agreement cannot be permitted, in an action found on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains. And the principle of the exception has been extended to other cases. So a person who has borrowed money of a savings institution upon his promissory note, secured by a pledge of bank stock, is not entitled to an injunction to prevent the collection of the note, upon the ground that the bank was prohibited from making loans of that description."

The principle of estoppel, applied to *ultra vires* contracts of domestic corporations, should apply with equal force to the contracts of foreign corporations which have not complied with the local law. When a domestic corporation enters into a contract in excess of its powers, it violates either the express or implied prohibition of the statute. The implied prohibition is just as imperative as though expressed.

The Supreme Court of Alabama has held, under a statute of that State declaring that it shall not be lawful for any person to act as agent for a foreign corporation which has not complied with the terms of the statute, and prohibiting foreign corporations under penalty from doing business before complying with such provisions, that a note and mortgage, given to a foreign corporation which has not complied with the law, are void and unenforceable, and that the transaction is illegal and the corporation cannot recover the amount loaned.<sup>2</sup>

Mr. Thompson, in his recent work on Corporations, in referring to the decisions of the Supreme Court of Alabama holding

<sup>1</sup> Second Edition, page 73.

gage Company, 88 Ala. 275; s. c. 7

<sup>2</sup> *Farrior v. New England Mort-* South. Rep. 200.

that the note or mortgage taken by a foreign corporation which has not complied with the law are void and unenforceable, says: "It cannot escape attention that these decisions ignore the distinction, often taken by enlightened courts in respect of the validity of contracts, between contracts which are merely *malam prohibitam*, and contracts which are *malam in se*. Such decisions put the contracts under consideration, although perfectly innocent and meritorious in themselves, on the footing of contracts which are essentially criminal, corrupt, or fraught with moral turpitude, or otherwise opposed to the public policy of the State. In leveling such contracts to this ground, and in allowing their own citizens to repudiate them on such a plea, while keeping the consideration, the courts degrade the commercial morals of the people, encourage general dishonesty, expel capital from the State, and bring its judiciary into deserved disrepute."

There is still another reason why the decisions of the Supreme Court of Alabama are unsound. As we have already stated, the primary purpose of a statute fixing conditions upon which corporations may do business in a State, where such statute exists, is to furnish a convenient means for the service of process, and to subject such corporations to the jurisdiction of the courts of the domestic State, to place within the convenient reach of the citizens of such State a knowledge of the powers and financial standing and responsibility of such corporation. Now, when the transaction is of such a nature that the party entering into the contract with a foreign corporation does not incur any obligations until there has been full performance of the contract on the part of the corporation, as in the case of the execution of a note and mortgage upon the receipt of the money loaned, the contract is not one which the statute was designed to affect. In such a case there is no necessity, on the part of the individual entering into the contract with the corporation, to enforce or protect any right, as against the corporation, in the courts of the local State; and it is immaterial to him whether the corporation is solvent or insolvent, because the corporation has performed its part of the contract. Regarding the intention and spirit of such statutes it cannot be held that they were intended to apply to contracts of the character just mentioned.

It is a familiar maxim of the law that where the reason for the law ceases the law itself should also cease.

These statutes should be so construed as will give full force and effect to the principles of estoppel and waiver herein discussed, and confine their operation to contracts which they were designed to affect. Such a construction will advance justice without in the least violating the spirit and intent of such legislation.

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## A NEW DEPARTURE IN FRENCH MARRIAGE LAW.

The French law of the 20th June, 1896, marks a new departure in the history of the French law of marriage. Its avowed object, proclaimed in its title, is that of rendering marriage more easy. The increased facility for marriage given by the law is, however, so inconsiderable that an Anglo-Saxon might consider that this title is ironical, did he not reflect upon the tenacity with which the French still hold to the patriarchal theory of the family tie and of parental authority. Insignificant however as the change may appear, it is none the less, as has been stated, a step in a new direction, and one of which it is profitable for the student of international law and of comparative legislation to take account.

In order to appreciate the effect of the new law we must first briefly review those matters with which it deals as they stood formerly. As the law stood previously, a son who had attained the age of twenty-five years or a daughter who had attained the age of twenty-one years could marry without the consent of their parents; but although actual consent was no longer necessary after these respective ages were attained, they were required before marrying to demand, in an instrument drawn up in solemn form of law before a notary, known as an *acte respectueux* the counsel of their father and mother or that of their grandfathers and grandmothers, when their father and mother were dead or incapable of manifesting their will; and between the age of twenty-one and twenty-five for daughters, twenty-five and thirty for sons, this *acte respectueux* had to be served a second and a third time at intervals of a month; and not until one month after the third service was it lawful to proceed to the celebration of the marriage.

It was felt that this repetition was a needless source of embitterment of the refusal of parental consent which necessitated the formality, and that it also entailed unnecessary delay in the

case of persons who had arrived at a competent if not mature age. The number of *actes respectueux* has therefore been reduced to one, and a month after the service of this one instrument the marriage can take place.

A further impediment removed by the new law is that embodied in the old text of article 73 of the code which provided that the consent of parents, in case it was required, could only be given in an instrument drawn up by a notary. Now a notary is in France a very different functionary from a notary public in England or America. He is a conveyancer and custodian of deeds, holding a semi-official position of great responsibility and consideration. Large fees are therefore an inseparable accompaniment of any document drawn through his instrumentality; and the necessity of discharging these fees in the case of a deed of consent to their marriage has proved an obstacle in the path of many a young couple in France.

The new law remedies this by providing that consent may be given either before a notary, or before the registrar of births, deaths and marriages of the domicile of the parent consenting; or abroad, before the diplomatic or consular representatives of France. Furthermore, it is provided that all deeds of consent, as well as *actes respectueux* (which latter must still be drawn up by a notary) are exempted from all dues, costs and fees to the officers who draw them up; they are also exempted from stamp and recording dues (*droits d'enregistrement*).

It frequently happened that evidence of the death of parents and of their consequent inability to signify their consent was not forthcoming in the shape of a certificate of death. Article 5 of the new law, supplementing article 155 of the code, provides that this deficiency may be supplied by the declaration upon oath, by the parties and the witnesses to the marriage, that the place of death and last domicile of the parents are unknown to them.

This is a noteworthy provision, being a derogation from the solemn nature of a French certificate of death as a mode of proof. The rule in France is that a record of a birth, death or marriage is a sacramental form of proof, absence of which can only be supplied by a cumbrous proceeding known as an *action en rectification d'état civil*, directed against the registrar and



subject to all the delays and expense of an ordinary action at law. The provision under consideration for the first time admits collateral evidence in the nature of an affidavit to supply the absence of record.

Three more articles complete the law: First, an article which provides that in case of disagreement between parents divorced or judicially separated, the consent of that parent in whose favor the divorce or separation was pronounced and who has obtained the custody of the child shall suffice. Secondly, an article which it is not necessary to notice in detail, the effect of which is to simplify the procedure upon caveats or oppositions to a marriage; and lastly, a provision assimilating a parent undergoing sentence of penal servitude to one incapable of manifesting his consent.

To sum up, then, the law has vastly cheapened and somewhat simplified marriage in France. Marriage is now distinctly more accessible to persons of small means, though only slightly less complex of accomplishment than it was before.

If, therefore, the old formalism has been only thus slightly relaxed, what, it will be asked, prompted the legislator to relax it at all? Why has the *patria potestas* not been left in all its pristine severity?

The reasons for the change are two. The French legislature has at last been roused to an attempt to stem the growing tide of irregular unions, especially in the great cities. "The simplification of the formalities of marriage," says Senator Ratier in his report of 24 January, 1896, "will have for its principal result to diminish the number of irregular unions which are becoming so frequent in our great cities and amongst certain laboring populations. The more steps there are to be taken, deeds to be drawn, expenses to be incurred, obstacles to be overcome, the more quickly the patience of the intended husband and wife is likely to be exhausted. Often it must be stated the complexity of our marriage formalities brings about cohabitations which the parties intended to transform into a regular marriage, but which in most cases are continued only to end ultimately in abandonment."

M. Félix Leroy, speaking in the Chamber of Deputies in 1888

on a bill introduced with the same object, says: "All economists and moralists, to whatever school they belong, agree in denouncing as a social peril the incessant progress of concubinage; \* \* \* another truth which has taken more time to come to light, is that many of these concubinages are the involuntary but indubitable result of the complicated formalities with which the Civil Code hedges round marriage."

In the second place the continued and steady depopulation of France is a matter of continual anxiety to each succeeding administration, and it is hoped that it may be to some extent checked by increased facilities for marriage. Time alone can show whether this is so, or whether, on the contrary, the causes of the depopulation are not beyond the reach of legislation. Certain it is that the marriage statistics of France, by comparison with other European countries, justify the change. For the proportion of marriages is lower in France than in any other country, as will be seen from the following table, giving the number of marriages per 1,000 head of population: —

Hungary .....	10.1	Wurtemberg.....	8.2
Russia .....	9.2	Baden .....	8.1
Saxony .....	9.2	England.....	7.9
Austria .....	8.5	Italy .....	7.6
Prussia.....	8.4	France .....	7.
Bavaria .....	8.4		

France also occupies the lowest rank in the proportion of births per 1,000; for from 1865 to 1883, the figures are as follows: —

Russia .....	49.5	Italy.....	36.07
Prussia.....	38.08	France.....	25.2

And the proportion in France (in 1890) had still further declined to 21.5.

Such then is the cause for this law, which, tentative and halting as it may seem to us, constitutes a veritable innovation upon the Gallo-Roman theories of marriage. To show how the theory of "conservation of the family" still persists in France, we have only to recall the amendment proposed by M. Charles Ferry which merely involved the — to our ideas — simple and obvious proposal to abolish the *acte respectueux* altogether after the ages of

25 and 21 respectively. Nevertheless, this proposal was voted — I had almost said — hooted — down, as absolutely “radical,” a “grave breach in the fundamental idea of the family.”

However this may be, we cannot but congratulate the French legislature upon their new departure, and trust that it will fully answer their expectations, so. as to induce them to still further relax the remaining restraints on marriage; for it is to the interest of the world's progress that a nation so highly gifted should increase and multiply.

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THE FALLACY OF COMPROMISE AND ARBITRATION.<sup>1</sup>

It may be—I do not say it is so—that the men of London may prefer to have their causes settled quietly and inexpensively by some sensible and honorable man who knows the nature of the business, and may be trusted, to the enormous expenditure and endless delay which often follows the litigation of questions in courts of law.

In 1891, when the late Chief Justice Coleridge hazarded this significant suggestion, the whole country, and particularly London, had gone arbitration mad. The Queen's Bench was despised and rejected, not merely by the lay, but also by the law press, as anyone who takes the trouble to look up the back numbers of some of the legal periodicals can verify, and arbitration was loudly proclaimed to be the panacea for the injured litigant. Since then many important changes have taken place, and not only the "men of London," but the country at large, is better able than it was to judge of the value of arbitration as a medium for the settlement of differences. It accordingly occurred to me that the present was a fitting time and occasion on which to offer a few remarks on the comparative efficiency of arbitration, since, if it in truth commends itself to the people, we have no right to complain, for every right-thinking man will recognize that his own interests must always be subordinated to the public weal, as he is after all but a servant of the people. In approaching this subject, we ought not to forget that a lawyer occupies a position entirely different to a layman. It is a position, indeed, of some delicacy, for if he is worth a straw to his profession and to the country he should have a certain amount of affection for the old common law which he has sworn to stand by and uphold. If he is a lawyer

<sup>1</sup> A paper read by Mr. C. H. Pickstone, solicitor, of Radcliffe Bridge, England, before the Incorporated Law Society, of that country, at its meet-

ing in Birmingham in October last. Reprinted from the *Law Times* of London.

in this high and proud sense of the term, it stands to reason that he will be inclined to be hypercritical in his opinion of a remedial agency the very existence of which must be a reproach to the law. Nor must it be forgotten that it is, and has been for centuries, an integral principle of our creed that arbitration and law cannot stand together, that law must be supreme, and that an attempt to substitute the arbitration room for the Queen's courts, or, in other words, to "oust the jurisdiction" of the Queen's courts, is to this very hour illegal. There is thus a certain tinge of heresy about a lawyer's espousal of the cause of arbitration. Given a science of law which — as I believe ours does — appeals to the reason, and has the confidence of the people, all that is needed is proper machinery for applying it, and I think there can be no question that it is not the law of England, but the administration of it, which has been the parent of arbitration.

In the abstract who will deny that arbitration is essentially unsatisfactory? For arbitration is not law at all. Law is a science built up of the accumulated "wisdom of ages," the aim and object of which — to borrow the quaint metaphor of the ancient sage — is to insure that "each shall sit under his own vine or fig-tree, and none shall make them afraid." Arbitration, on the other hand, has a contempt for legal principles. It is an illusory, impalpable quantity, the ephemeral delivery of a casual mind, the aim and object of which is to achieve that notorious impossibility, the serving of two masters. How bitter, then, must be our sense of humiliation to observe lawyers occupying high positions, and legal periodicals of commanding influence, contrasting law and arbitration unfavorably to the former. It has always been a mystery to me how anyone with any experience of the remedy could recommend arbitration as a medium for the settlement of differences; but to have great lawyers do so without apology has seemed to me nothing short of an insult to the people. You remember how the idea that a father, of whom his son asked "bread," would give him a "stone," was ridiculed. But to give a stone in place of bread is no more than parallel with the incongruity of a lawyer offering his client, in place of a draught from Chief Justice Wilmot's "pure foun-

tain of justice," a mouthful of that sickly adulteration which is dispensed in the arbitration room, and the better quality of which is denominated "substantial justice." I challenge anyone, lawyer or layman, to combat the deliberate assertion that, speaking generally, the most unsatisfactory tribunal which the wit of man has yet devised is the arbitration room. How unsatisfactory? From every standpoint. I maintain that it has not a solitary good point to recommend it. Is the Queen's Bench costly? What is arbitration? Is the Queen's Bench dilatory? More so than it ought to be, I admit. But at any rate Her Majesty's judges have no interest in prolonging the proceedings, which cannot be said of lay arbitrators, whose remuneration expands with the length of their sittings.

But it is urged that a judgment of the Queen's Bench is indeterminate. What could be more indeterminate than an award? It is notorious that an award is often but the beginning of litigation, for even if it survive the charge of irregularity, it is open to a host of legal objections that could never be launched against a judgment; and the client who has been flattering himself with the thought that in electing to go to arbitration rather than law he has done a good stroke of business, will in all probability experience that unpleasant sensation popularly described as "getting out of the frying-pan into the fire."

But the most striking refutation of the efficacy of arbitration, and its strongest condemnation, is that it never satisfies either party. No one who has studied the faces issuing from a law court — whether it be the great tribunal of justice in the Strand, or the humblest of County Courts — can fail to distinguish the victors; their beaming countenances and animated conversation betray them, and I know of no more exuberant joy than that of the litigant who has successfully vindicated his right against another's might. But let an observer study the faces that emerge from the arbitration room, and what does he see? Instead of the beaming countenance of a victor and the plucky, grin-and-bear-it air which in my experience has ever been characteristic of the Englishman fairly beaten, there emerge two crestfallen and utterly woe-begone individuals, endeavoring to

look pleasant, though obviously consumed with a devouring longing to swear. And why? Because neither side has won — no “side” ever wins in the arbitration room.

A laudable attempt is made to mete out that nondescript quantity, substantial justice — a commodity which it is exceedingly difficult to measure, and which pleases no one. What is “substantial justice?” It certainly is not pure justice: it is justice minus just so much as is covered by the qualifying term “substantial.” It is neither fish, flesh, nor good red-herring. It bears the same relation to the genuine article that plated silver bears to silver-plate, or that “fresh” eggs bear to “newly laid.” It is, in fact, a commodity of which a lawyer should be ashamed, and with which a client is generally as disgusted as is an honest man who has secured that *brutum fulmen*, the “moral” victory. Oh, the chilling irony of this term! And yet it is the invariable consolation of the arbitration room. Even if one party is palpably in the right, and as such entitled to the verdict, how frequently is a sop thrown to the other in the shape of a remission of the winner’s costs, the being saddled with which takes all the gilt off the victory. No, for my part, I am firmly convinced, and I do not scruple to assert, that the accepted motto of the British litigant is “Win or lose!” “Give us victory or give us death!” is the popular sentiment, no half-hearted “moral” victory. In nearly every case one’s client is either right or wrong. If he is right it is an insult not to vindicate it; if he is wrong it is an injustice to make his opponent bear a portion of his punishment. I do not, of course, decry “conciliation;” no one knows better than the lawyer how necessary conciliation sometimes is.

But “conciliation” and “compromise” are by no means synonymous. One may employ conciliation even to the extent of inducing the client to “forgive his enemy,” but beware of compromise. The distinction between “conciliation” and “compromise” is clear: the one is an argument with unreason in the sacred precincts of your own office, and preparatory to the “letter before action.” The other is addressed to your opponent; it is an admission of weakness, and as such is viewed with suspicion by a strong man, and as a sign of ultimate capit-

ulation. My opinion of what a client wants is not to fight at all unless he is legally right, but, having once made up his mind to fight, it is *guerre à mort!*

Which of us has not had occasion to bitterly regret his own want of initial firmness when, at the end of a protracted series of letters "without prejudice," he finds himself compelled to fight with an attenuated case? There are probably few of us who have not experienced the bitter sense of mortification aroused by the suggestion (generally of weak or impatient judges), "Cannot you two gentlemen put your heads together?" — the usual meaning of which is that the judge, for some (generally) inscrutable reason — sometimes, indeed, for no reason at all — has determined that the case is one for compromise. Although it is offered as a suggestion, no one knows better than the unfortunate advocates to whom it is addressed that it is an imperative command. Compromise at any stage is an expedient that demands the greatest tact and most anxious consideration on the part of the practitioner, and is seldom to be recommended except perhaps where it will prevent the washing of a lot of dirty linen. But it is compromise, at the eleventh hour and under pressure that breaks the heart of the lawyer and disgusts the client. To such an extent, indeed, do I believe compromise to be abhorrent to the instincts of the Englishman that I do not hesitate to say, that a man who gets the reputation of being a "settling" and not a "fighting" lawyer is doomed.

Compromise is the very life of arbitration. The fact is, that in the usual case of a reference to two arbitrators the arbitrators have no pretensions to judicial impartiality, and are mere partisans, each considering that his *rôle* is to do the best he can for "his man," and utterly oblivious of the fact that they should regard and behave themselves as judges. To such a pass have things come that the usual course of proceeding now seems to be, when one party has nominated as his arbitrator a person obviously disqualified by interest or bias from bringing a judicial mind to bear on the facts, his opponent, instead of objecting and, if necessary, applying for an injunction, resignedly takes refuge in the craven expedient of appointing a second so-called "arbitrator" equally prejudiced in the other direction. The offsprings



of two blacks is, however, notoriously not a white. It is surprising that in such circumstances they fail to agree, and that the services of the umpire are almost invariably requisitioned? The absolute illegality of this partizanship of arbitrators is unquestionable, and was strongly insisted upon by Mr. Justice Erle in the case of *Oswald v. Grey*,<sup>1</sup> when he said: "It appears in the present case that each of the arbitrators has considered himself as the agent of the party who nominated him. This is a notion which ought strongly to be repudiated, and it is wrong for an arbitrator so nominated to consider himself appointed to take care of the interests of one party only and not of the other as well."

How such a tribunal, proceeding on such an apology for legal principles, can ever commend itself to a lawyer has always appeared to me incomprehensible. Nor have I in a provincial practice discovered any popular demand for it. On the contrary, I have oftentimes witnessed the mortification of a client who, thanks to the pernicious "Arbitration Clause," or the grandmotherly solicitude of Parliament, discovers too late that he has all unwittingly, perhaps, been deprived of what he had fondly thought was his inalienable right—the right of invoking the aid of his country's law. Such is the occasion on which to get an outspoken estimate of an Englishman's idea of arbitration.

If anyone thinks this assertion extravagant, let him study the Digests for the last ten years, and see the variety of attempts which have been made to escape the octopcean grasp of a stringent Arbitration Clause; to escape, that is to say, a tribunal which was presumably the party's own original choice. It has been urged that the public have lost confidence in the Queen's Bench, and have demanded a substitute. I do not believe this is so, and have yet to meet the "business man" who placed the arbitration room above the Queen's Bench as a medium for the settlement of differences. Let the apologists for arbitration say what they will, no "arbitration chamber" can command the confidence and respect with which the Queen's courts, in spite of their shortcomings, are regarded by the British public. A

<sup>1</sup> 24 L. J. Q. B. Div. 69.

judge is notoriously independent of the parties who come before him—indeed, they scarcely know whence he comes or whither he goes; he can view with perfect mental equipment the issue he has to try; long training and practice have formed in him the habit of grasping facts rapidly, of appreciating their relative significance, and of drawing correct inferences from them with logical precision. And above and beyond all, there is the certainty that he will decide the issue by the application of intelligible and accepted legal principles, the soundness of which can, if necessary, be tested, instead of by the haphazard “difference-splitting” which prevails in the arbitration room. A judge (without a jury for preference) is an infinitely better and more satisfactory tribunal than any body of arbitrators, voluntary or official, can ever be. No judge is less given to loquacity than Mr. Justice Day, but even he broke out on a recent occasion at Manchester. “It is shocking to think,” said he, “that actions of this sort (colliery flooding) sometimes go to a reference, and last from month to month, often for more than a year; whereas under the present circumstances [trial at the assizes] this case has occupied only four days and a fraction.”

There is another argument which has always seemed to me to afford a striking condemnation of the theory of settling disputes by arbitration, and upon principles other than legal, and I hope you will not consider it a far-fetched one. I refer to the fact that in the Revealed Law—where one might, perhaps, more than anywhere else have expected to find the “give and take” principle propounded—legal principles applied by duly constituted “judges” were insisted upon as the only proper medium for the settlement of differences. If we turn to Deuteronomy,<sup>1</sup> we find this stated with remarkable force and precision: “If there arises a matter too hard for thee in judgment between blood and blood, between plea and plea, and between stroke and stroke, being matters of controversy within thy gates, then shalt thou arise \* \* \* and shalt come unto the judges that shall be in those days, and inquire, and they shall show thee the sentence of judgment. And thou shalt do \* \* \* according to

<sup>1</sup> Ch. 17.

the sentence of the law which they shall teach thee, and according to the judgment which they shall tell thee thou shalt do; thou shalt not decline from the sentence which they shall show thee to the right hand nor to the left." This remarkable pronouncement should have special weight and influence with a lawyer, inasmuch as our law, as Blackstone reminds us, is in part founded upon and "should not be suffered to contradict" the Revealed Law. But apart from this consideration and from any question of religious opinion, it is interesting as evidencing the rejection in a primitive state of society of the method and principle of arbitration. Why was it rejected? I think I have said enough to show that both in the abstract and in the concrete arbitration as a medium for the settlement of differences is an egregious failure. There is, however, a last consideration which perhaps more than any amount of abstract reasoning should serve to drive home the last nail in the coffin of arbitration. Of course, I allude to the chequered career of the "Infant English Tribunal of Commerce," as its progenitors fondly termed it, which on the 23d November, 1892, was born into an expectant world. Some of us will doubtless recollect the despairingly pessimistic paper read by our friend Mr. Herbert Bentwitch at Manchester three years ago, in which he deliberately espoused what he candidly admitted was a "policy of despair," *i. e.* the cause of arbitration, particularly in reference to the birth of the "infant" in question. It will be remembered that he lugubriously asserted that the time had arrived when we lawyers "must follow to the chambers of arbitration the work which has been withdrawn from the courts." Like Moses of old, he would have led us into a "promised land," a land "flowing with milk and honey," even the fertile plains of the Chamber of Arbitration, which, he seductively assured us, might be made "the very tribunal for solicitors." The invitation, however, fell on deaf ears: lawyers preferred to sojourn in the "wilderness of single instances." And the event proves their wisdom. Had we followed Mr. Bentwitch's lead into his promised land, one thing is very certain, and that is that long ere this we should have been reproaching him in the language of the ancient Israelites: "Wherefore have ye brought us into this evil place?"

It is no place of seed or of figs or of vines or of pomegranates," for this lamentation would aptly describe the condition of the London Chamber of Arbitration.

Most of us will recall the events which led up to the inauguration of this tribunal, and the expected crisis in our history which it was to have brought about. "23d Nov. 1892 is a day to be remembered in the legal history of this country, for it witnessed the inauguration of the most dangerous rival which our law courts have yet seen."<sup>1</sup> And that good old Job's comforter, the *Law Times*, of course had its periodical fit of hysterical pessimism: "Twelve hundred matters are said to be already in the Registry of the new City Arbitration Chamber, calling for settlement — anyhow, but settlement. Each one of these 1200 matters is a reproach to the Supreme Court of Judicature and to every successive Government and to successive benches of judges who have allowed the established tribunals of the land to fall behind the age and the wants of the people."<sup>2</sup> The *Law Journal* alone refused to welcome the "infant," and, undismayed by the croaking of the pessimists, loyally stood by the Queen's Bench. And has not its sagacity been abundantly established? Four short years have passed, and what has become of this "dangerous rival" which was to supplant the effete and discredited Queen's Bench? What became of the 1200 "reproaches" which the *Law Times* alleged was crying to heaven for redress? What has become of the appalling list of sixty-eight folio pages recording the names of the 1200 "arbitrators" who were appointed to stem the pent-up torrent of "reproaches" which was expected to pour into the Chamber the moment the door was opened?

The most striking answer to these inquiries is, No one knows. We do know, however, that the "dangerous rival" that was to pioneer the way for the ultimate absorption of all the commercial business of the country, up to August, 1896, had only had a beggarly forty cases submitted to its decision. "How are the mighty fallen!" But it will not have lived in vain; for

<sup>1</sup> Vide *Liverpool Journal of Commerce and Law Journal*, vol. 27, p. 782.

<sup>2</sup> 94 L. T. 74.

it has helped to arouse the profession from a state of chronic supineness to a sense of its duty to the public, which has resulted in several much-needed reforms in legal administration, some of which have already been brought into operation, whilst others are on the eve of accomplishment. It was expected at the time that the idea would "catch on," and that similar tribunals would be established in commercial centers like Manchester, Liverpool, and Birmingham. But Manchester and Liverpool were cautious; they were not so enamored of the idea as London was; they wanted something more substantial than a Chamber of Arbitration.

What said the *Liverpool Mercury* at the time? "There are various reasons for doubting the advantages of such a chamber, the chief one being the want of the judicial element in arbitration. \* \* \* The past experience of arbitration in this city has not been favorable. Some few years ago, when this method of settling disputes was much more in vogue, it was found that arbitrators (except a few much-sought-after ones) had an unfortunate and injudicious tendency to decide on the lines of 'splitting the difference,' a proceeding which, however advantageous to the settlement of commercial haggling, does not recommend itself to the minds of suitors anxious for their rights." I believe the *Manchester Guardian* has expressed similar views. We have it on the authority of a great politician, in a phrase which has now become classical, that "what Lancashire thinks to-day England will say to-morrow." And Lancashire's thoughts on the arbitration question would at length appear to be on the eve of realization by the concession of the one tribunal that has the heart and confidence of the country, *scil.*: a judge of the High Court whose sittings will be substantially continuous, and who may be expected to do for Lancashire commercial cases what Mr. Justice Mathew has with such signal success accomplished for London.

The conclusion to which one is irresistibly driven is that the "men of London" do not "prefer to have their causes settled" in the manner indicated — hesitatingly, it is true — by the late Lord Chief Justice. The Queen's Bench still holds first place in the hearts of the people, still commands the loyal affection

and the confidence which is the reward of tried and faithful service. The preservation of this relationship between the law and the people rests with the profession; and I believe we are fully alive to the responsibility, and ready to cheerfully sacrifice self-interest upon the altar of public experience. It is certain that never before in legal history has the profession been so thoroughly awake to the fact that the law as a remedial agency is impotent unless the machinery for applying it is maintained in efficient working order, and with a due regard to the improvements which the exigencies of an ever-developing commerce and civilization demand. If we persist in our agitation for certain well-recognized and pressing reforms — particularly the restriction of interlocutory applications and appeals, the introduction of the wholesome principle of taxation that the unsuccessful litigant must indemnify the victor, and the extension of the jurisdiction and readjustment of the fees in the County Court — the pernicious expedient of involuntary compromise will be abandoned, the much-dreaded “Arbitration Clause” will become a curiosity; and the Chamber of Arbitration, deprived of its only supports, will go down to an untimely grave “unwept, unhonored, and unsung.”

## BRACTON: A STUDY IN HISTORICAL JURISPRUDENCE.

A study of the monuments of legal history possesses a peculiar fascination. From them may be traced the growth of national life, and that too with more certainty than by any other documentary evidence. It is this human interest that is to be found in the mustiest pipe roll or dustiest chancery precedent that makes legal research a pleasure rather than a task.

In a consideration of legal history certain names come to our view with constant recurrence. These words, these names: Glanville, Bracton, Fleta, that meet us at every turn in the somewhat devious paths of early English legal history are not mere signs used to convey the conception of a legal epoch or impulse, they stand for men as well as works. They bring us back to an age in which our present system of law was in an actively formative period and show us the first pioneers in the juridical literature of England.

The study of the personality of the men whose names I have recalled makes the law of their time as real and living as that which is being placed upon our statute books or enunciated by our judges in this year of grace 1897.

There is one name in English legal history that stands preeminently above all others. Brooke, Fitzherbert, Hengham, Littleton, Coke, Blackstone, Christian, Stephens were proud to confess their obligations to that "old master" whose work has come to us under the name of Bracton.

This is, however, an age of incredulity, an age of investigation, of enlightenment by individual endeavor, and before we accord to this authority even a moiety of that meed of praise of which our forbears have deemed him worthy, let us study the man and his works for ourselves. Self-conviction will give added weight to our tribute, should we find the payment just.

Before considering the contributions to legal literature which

are associated with the names of Bracton let us make the acquaintance of the man himself.

We have a choice of names by which we may know him. The English records furnish: Bracton, Bratton, Brattan, Bryekton, Britton, Briton, Breton. All these names are believed to have been used to designate but one person, Henry of Bratton or Bracton. As he has become so indissolubly identified with the book called Bracton we will, at least in this case, adhere to the doctrine which he was the first to recognize, that is, *stare decisis*, and know him as we call his book.

It is probable that he was born in Devonshire, but there is no certain evidence that points to this or that village as the unquestioned place of his nativity. Professor Maitland, in his erudite edition of Bracton's "Note Book," to which I am most deeply indebted for information not elsewhere available, has relieved us of that carking suspicion that Bracton had an abnormal quantity of teeth, and at the same time demonstrated beyond a reasonable doubt that he was laid at his death in the nave of Exeter Cathedral, of which church he had been chancellor; for there "Bratton's altar stood," and as the bell which bore his name sent to the waiting world the call to evensong, the memory of the morning mass sung for the health of the soul of the dead chancellor recalled to the people a learned and upright judge.<sup>1</sup>

Aside from legal records, we have little, if any, contemporaneous record of Bracton's busy life. The first biographical notice that I have found of him is that given by Leland, in *Commentarii de Scriptoribus Britannicis*, and upon this have been based the existing popular biographies of early date. Tanner in his biographical work, as well as Bale in *Illustrium Majoris Britanniae Scriptorum Catalogus*, uses Leland's account of the life of Bracton; and Bale further says that Bracton was educated at Oxford. There is absolutely no trustworthy evidence upon which to base this last assumption; yet this error is to be met

<sup>1</sup> Bratton Court in Minehead LXVIII., *Monasticon*, Vol. 6, p. 1097. parish claims to be his burial place, *Roll. Parl.* Vol. 1, p. 3, Intro. to Note Book. Maitland, 15. Exeter. Twiss. Bracton, Vol. 2, p.



to-day, generally, but not always, in company with the equally fallacious statement that Bracton was a practicing attorney and so gained his knowledge of the intricacies of procedure.

From Bale<sup>1</sup> to Foss<sup>2</sup> little light was shed upon the personality of Bracton. It may be truly said that Maitland<sup>3</sup> and Rigg<sup>4</sup> have given us more exact knowledge of Bracton than the sum of their predecessors.

We may conclude in the light of present information, that Bracton spent the greater part of the active period of his exceedingly busy life in his native county of Devonshire, and there he made his home. He gathered some property, and was not dependent upon the judicial salary or ecclesiastical emoluments that fell to him.

He was both a churchman<sup>5</sup> and a jurist, rather a common thing in his time, when in the majority of cases, piety was no more essential to ecclesiastical preferment, than legal learning to a judge. Bracton, though, was a pious, godly man, whose face was set against corruption, fraud and ignorance, even in high places, an attitude as rare in his day as in ours, and infinitely more dangerous to its holder. His efforts purified the judiciary which he graced by his learning.

We can point to certain well authenticated periods in his career, and with these as a basis we have but slight difficulty in constructing an almost continuous record of his legal activity.<sup>6</sup> In 1245, he was a justice in eyre in the counties of Lincoln, Nottingham and Derby. In 1248, he took the assizes in Cornwall, Devon, Somerset, Dorset and Wiltshire; and here we find him associated with Judge Henry of Bath, whom he afterwards exposed for veniality in office. In 1253, 1255, 1256, 1257, 1259 and 1267 we have records in which his name appears; and, among the facts gleaned from these records, we learn that, in

<sup>1</sup> Illus. Maj. Brit. Scrip. Cat., *supra*.

<sup>2</sup> Lives of the Judges.

<sup>3</sup> Bracton's Note Book.

<sup>4</sup> Encyclopedia of National Biography.

<sup>5</sup> Besides authorities mentioned, see Pauli's Geschichte von England, III. 823.

<sup>6</sup> As instances in Records: Placitorum Abbreviatio f. 138 ex. 36 Henry III. (1252), New Foedera I. 320, second assize of 39 Henry III. (1255): Excerpta Rot. Fin. 1250-67. See also Dug. Chron. 13, Seld. Heng. 120.

addition to the usual salary of £40 per year the king, in 1254, made him a gift of royal venison, and in 1255 gave him a London residence.<sup>1</sup> In 1256 more venison was granted the favored judge. It is, perhaps, this evidence of an abundance of provision that has led zealous partisans of Minehead to advance the hypothesis that the skeleton with the double row of teeth now resting in that parish is that of Bracton.

During the twenty years that preceded his death he was a judge, and for at least a part of that time held pleas before the king. The learning and probity that distinguished him, caused him to be trusted by all the conflicting parties of his time. Although in high favor with his royal master, yet when the patriotic and constitutional party triumphed he held his place. "Men may come and go, constitutions may be established and annulled, king or earl may be victorious; but Bracton takes the Devonshire assizes."

Something of a mystery rests upon the question of his death. No data conclusively establishes its exact date or place. The story of his death at Lewes has, however, been disproved. Some time between 1265 and 1268 he was borne to his last resting-place in the Cathedral of Exeter.

The years of Bracton's greatest usefulness were stirring ones. The clash of arms sounded throughout the land. The Barons warred against the King. The sunshine of peace was shadowed by either retreating or advancing war clouds. Yet those years of turmoil gave birth to much that was of vital importance in the upward growth of the nation. The children of storm and battle were to be stronger in peace than their parents in war. When we read of "The Mad Parliament, The Provisions of Oxford, of Westminster, The Mise of Amiens, The Battles of Lewes and Eversham," we are reading of the times of Bracton.

Constitutional changes were not the only ones that marked these years. We find the pages of judicial history crowded with the events of those days of change. If we compare the status of English jurisprudence of the time of Bracton with that of the

<sup>1</sup> Hen. III. (1254) grant by patent during the minority of the son and for his chambers, of the London Mansion of the deceased Earl of Derby heir of the Earl.

later half of the 12th century, we perceive that a great change has taken place. In following this development we find that a stage has been reached where, as says Professor Güterbock, "The Feudal System is completed, new forms of actions (assizes) have taken the place of early methods, the recognition of judicial decisions as authorities and productive sources of law have been established, and these together with the impulse given by Roman law and the scholastic spirit animating the lawyers had, since Glanville's time, developed English law into an artistically organized and often overrefined system."

Law had become a science, and a science too broad and deep to be comprehended by those untrained in it. The days when a man was appointed a judge for the strength of his arm were drawing to a close, and the monarch's choice fell upon men learned in the law. Advancement brought enlightenment, and with the development of the written law came the consciousness of the inadequacy of the *jus non scriptum*. "*Sola Anglia usa est in finibus suis jure non scripto*," said Bracton.

The need of what had not as yet been created in England, an authoritative legal text-book of English law, came to be apparent.<sup>1</sup> "A scientific commentary upon the law of the land," as established by precedent was the want of the hour. The fulfillment of the demand was made possible by Bracton. This author gave to legal literature two works, his Treatise, a text-book based largely upon adjudications of English judges; and his Note Book, which comprised a collection of cases grouped into orderly divisions.

We will first consider the Treatise, or, as we find the title printed in the several editions of his work, "Henrici de Bracton de Legibus et Consuetudinibus Angliae Libri quinque in varios tractatus distincti." The question of the date of this work has given rise to much difference of opinion. It is, however, probable that the work was hardly begun as early as 1245, but rather

<sup>1</sup> Such a work was needed not only to direct the studies now necessary and to guide practitioners themselves, but also to protect suitors against ignorant or malevolent judges, who

at that period might very possibly make their own arbitrary rulings a substitute for law. Güterbock. Henricus de Bracton.

about 1250. It was in process of construction in 1256. In 1258 it was revised; but after this date no work was done upon it save in the way of glosses or marginalia; and with this view Maitland and Twiss agree. I cannot, however, lay as much stress as Professor Maitland upon the argument that as Bracton was in 1258 deprived of the Rolls, which up to that time were at his disposal as authorities, he there and on that account ended his work upon the Treatise. If the manuscript edited by Professor Maitland is the "Note Book" of Bracton, which I believe it to be, there can be no manner of doubt that Bracton did not lack authorities. Therefore, his loss of the Rolls cannot strengthen the assumption that after 1258 no large amount of work was done upon the Treatise. This date is more nearly established by internal evidence of uncorrected errors of the manuscript, although this evidence is by no means conclusive.

The work is an unfinished one. It breaks off in the midst of an exhaustive dissertation upon the Writ of Right, and there remains no evidence that Bracton ever concluded his treatment of this subject. Succeeding legal authorities, notably Fleta and Britton, carry the subject no further than Bracton, stopping where he stops, and this in itself indicates that if there existed a continuation of the subject at any time, it was unknown to the immediate successors of Bracton. The weight of evidence is in favor of the conclusion that for some reason, yet unexplained, Bracton did not live to complete his work.

An accurate text is necessary to the critical study of any author. Here has been the main difficulty to earlier research in Bracton's work. It is true that MSS. exist in considerable number, most of which may be said to have come from the MSS. of 1275, and several early editions of Bracton are procurable, but between the various MSS. there is much variance and the early printed editions are poorly edited. The difficulty in correctly reading Bracton does not lie in the author's language, but in the confusing and conflicting glosses and interpolations of the various students and scribes through whose hands the MSS. have passed. We have to-day, however, a text of Bracton, and by the erudition of Professor F. W. Maitland, a most satisfactory text of the Note Book.

We can, in describing the scope of the Treatise, use no better words than those used by Bracton to express his purposes and hopes, when he commenced his self-imposed task of giving to Englishmen that which they had never before possessed: —

“Cum autum hujusmodi leges et consuetudines per insipientes et minus doctos, \* \* \* saepius trahantur ad abusum, et quae stant in dubiis, et opinionibus multotiens pervertuntur a majoribus, quae *potius proprio arbitrio quam legum auctoritate casus decident* \* \* \* ad instructionem saltem minorum animum erexi ad vetera judicia justorum perscrutanda \* \* \* *facta ipsorum consilia et responsa* \* \* \* *in unum summam redigendo.*”

As has been aptly said, “the clear and lucid picture of law, of the fullest detail and all arranged in a logical and lucid system was, as far as he wrote, a fulfillment” of the words quoted.

The law of the land, the common law, forms the principal subject of his consideration, and this is treated broadly and philosophically. Procedure, both in civil and criminal cases; rules of substantive law; the feudal system; the law of real property, and that concerning things personal; as well as much that belongs to other divisions of jurisprudence are treated in this, the most important of our earlier legal classics devoted to English common law.

The Treatise is divided into five books: The first two are headed, *De Rerum Divisione*, and *De Adquirendo Rerum Dominio*, and are divided into chapters and paragraphs. The other books have no headings, they are divided into tracts, and these into chapters and paragraphs. The third book contains two tracts: *De Actionibus*, and *De Corona*. The fourth book has seven tracts. The first five are named after the assizes of which they treat. The last two treat respectively, *De Actione Dotis*, *De Ingressu*. The fifth book is divided into five tracts, as follows: *De Breve de Recto*, — *De Essoniis*, — *De Faltis*, *Warrantia*, *De Exceptionibus*.

We read the careful well chosen Latin, in which now and again appears an Anglo-Saxon word which seems to express the exact shade of meaning better than its Latin representative, and

we are attracted by the extreme practicalness of the whole work; and yet utilitarian ideas are not pressed to their fullest extent, for we find the mode of presentation graced and varied by "versus memoriales" and digressiones.

Before proceeding to a further review of the Treatise, I wish to introduce the manuscript known as the Note Book. This historic document was given to the world as the work of Bracton, through the research of Professor Vinogradoff, and it happily fell to the lot of Professor F. W. Maitland to prepare the manuscript for the press. The Note Book being less known than the Treatise, I will describe it more at length than I otherwise would.

Twenty-four quaternions of parchment, of which two are imperfect and one much longer than its fellows, are bound together into a volume about eleven inches in height and nine in breadth; and we might find this, if we could see it in its resting-place on the shelves of the British Museum, by remembering the three labels which adorn its broad back. They are as follows: —

Placita Et Assisae 1-24 Hen. III.

Mus. Brit. Jure Emptiones.

12,269, Plut. CLXXII. C.

The first quaternion is not perfect. One sheet is missing,<sup>1</sup> and one is much injured. Some exercises in the second quater-

<sup>1</sup> The contents of the missing portion have been virtually restored by Professor Maitland.

nion make a few words in a gloss illegible. The end of the book seems to be missing, — but what part, if any, has disappeared is as yet undetermined. On the whole, with the exceptions just noted, the work is in good condition.

The Note Book contains some 2,000 excerpts from the judicial records of 1-24 Hen. III. These transcripts of cases are in the handwriting peculiar to the thirteenth century; although, from variations in the writing, we conclude it to be the work of several scribes, some four or five, and these copyists were evidently employed at the same time. "Every indication," says the learned editor of the Note Book, "points to haste in construction; in writing one part of the work two clerks constantly relieved each other at short intervals;" and this fact is important in suggesting the probable date of the compilation. There seems to have been a well-arranged system of work. The headings were written and assignments made by one person. As the clerks completed their assignments the various pieces of parchment of which the book is made up were delivered to the person in charge, by whom they were placed together. The work, despite the evident haste, was well done, as a comparison of the manuscripts with the rolls shows.

We see in this collection of cases, the first that is known to English legal history, the work of a man who had in his mind a definite system of selection, and whose work was done with the specific object of furnishing data for the development of legal topics. No man before Bracton had conceived and executed the idea of the validity or value of English judicial precedents to the determination of future cases; and no one for generations after his death took up the work and thought he left behind. Indeed, the legal writers of authority, whose works follow Bracton and use as their basis, if not as their sole subject-matter, the theories and conclusions of his work, eliminate as unnecessary, the cases cited by him.

I wish to call attention to the internal evidence which, as I have already stated, shows the extreme haste which seems to have been necessary in the preparation of the Note Book. From such evidence, I conclude, after a consideration of the arguments advanced by the editor of the Note Book, that the date of this

work may be set at 1258, the year of the Exchequer order for the return of the rolls. Up to that time Bracton had in his hands the rolls themselves and needed a work such as the Note Book but little. Its use would have been more as an index-digest than as a compilation of authoritative cases. The marks of reference upon the rolls themselves show this index to have been unnecessary, and, as unnecessary, it probably did not exist. The order to return the rolls found Bracton unprepared with data from which to complete his treatise independently of the rolls. It would seem probable that he immediately assembled such working force as was at his hand, and proceeded as rapidly as he could with the work of transcribing from the rolls the cases which he needed; thus work may have been outlined, and even commenced before the Exchequer order was received; be this as it may, when the time came for the rolls to be at the treasury, Bracton had at his command the data which he required for the completion of the treatise.

He was not destined to complete this work; for the last ten years of his life were so crowded with stirring events that he could do no more, if he worked upon it at all, than make now and again a note upon its margin. It would seem that, upon the return of the rolls and the completion of the Note Book, the incentive to immediate or continuous action was withdrawn, and the treatise was laid aside, with the thought that, on a future day of leisure, it would be completed. But that day never came to Bracton.

We will now consider more critically the *Legibus et Consuetudinibus Angliæ*.

We may say of the English law before the age of Bracton, *Jus non scriptum consuetudinarium*. The written sources of law were few and untrustworthy. There was, however, a growing sentiment in favor of an organized system for the preservation of judicial records, and the transactions of the various courts began to be carefully compiled and properly cared for. Bracton was, however, the first English jurist to express his acknowledgment of the authority of the decisions of courts as an authoritative expression of law. To quote his words: "*Si autem aliqua nova et inconsueta emergerint, et quæ prius usitata non fuerint*



in regno, si tamen *similia evenerint, per simile, judicentur cum bona sit occasio a similibus procedere ad similia.*"

The treatise is English. It is founded on English case law and English customary law. Its development is English. The terminology and presentation, however, show that the author owes much to the Roman jurists. Bracton had drunk deeply at the source of Roman Jurisprudence. He was familiar with the Corpus Juris, Civilis, the Decretum, and Decretals, as well as the Digest, Code and Novellæ. He had studied the works of the masters. From these studies he had trained himself in logical methods of presentation. His work is arranged upon a Roman plan. It contains many principles and maxims borrowed from Rome.

The first part of the treatise is indebted for its main characteristics of form to the well known trichotomy of Justinian's Institutes: "Quod omne jus pertinet vel ad personas, vel ad res, vel ad actiones." We note this Roman influence throughout his work, and especially when we compare it with those of Azo and Placentum; for we mark the same breaking of the subject-matter into interrogatory headings. We must not, however, give undue prominence to this Roman influence. As I shall endeavor to demonstrate, Bracton used the logical methods of Rome but his law was English.

We naturally pass from the consideration of the form of the work to the authorities upon which he bases his conclusions. We may with propriety divide these into English, judicial and customary, and pseudo-foreign. I would advance the thesis that, despite the manifest debt which Bracton owes to Rome, he in general puts forward no legal principle, and states no authority as conclusive, that has not received a recognized place in England as a part of English law.

Bracton cannot be accused of attempting to foist the Roman law upon the English people; indeed, in more than one instance he leans strongly from both canonists and civilians. "To take a most obvious instance," say the learned authors of the History of English Law, "in the great controversy about the legitimizing of bastards, he is as staunch an opponent of the leges and canones as the most bigoted baron could be; and indeed we find

some difficulty in absolving him from having falsified history in order to secure a triumph for English law."

The Treatise is in the main based upon some 494 cases which were actually decided in English courts; and Bracton claims this source for the greater part of his work. "*Vetera judicia iustorum, facta ipsorum, consilia et responsa.*" It is to be noticed that he does not employ citations, "Where rules of law have been recognized by ancient customs, or where principles, through long acceptance, have become a recognized part of the law of the land. He uses them rather as the highest authority "in the solution of difficult and doubtful questions, or to establish the origin and existence of a principle of special character or recent date."

We can group the citations used by Bracton into four general classes;—those from the De Banco Rolls (1217–1234), Coram Rege Rolls (1234–1240); Eyre Rolls; and a few from later and miscellaneous rolls. We note upon examination that these precedents, with few exceptions, come from the rolls of but two judges, Martin Pateshull and William Raleigh. Various reasons have been assigned for this selection. It has been ascribed to political affiliation and judicial predilection. It would seem, however, that the explanation to be found in the introduction to the Note Book<sup>1</sup> is the most probable of any. "Bracton had Pateshull's Rolls and Raleigh's Rolls in his possession. Segrave's he could not get; they were at Liecester or Kenilworth: all should by rights have been in the Treasury. Bracton could only use habitually such as had come to his hands by happy accident."

Bracton made but slight use of Glanville; we find, however, some few quotations, the most notable of which are Lib. II.<sup>2</sup> taken from Glanville VII.<sup>3</sup> and Lib. II.<sup>4</sup> *De emptionibus*, from Glanville.<sup>5</sup> We find that in several cases customs are cited which, it may be said, had come to be looked on as law.

We will now consider the so-called foreign influence in Bracton and endeavor to estimate its extent and force.

<sup>1</sup> Ed. Maitland.

<sup>2</sup> C. 26.

<sup>3</sup> C. 5.

<sup>4</sup> C. 27.

<sup>5</sup> XC. 14.

The Roman Law, the law of the Civilians, has exercised the most marked influence upon Bracton of any pseudo-foreign impulse. The Decretum and Decretals have left but faint impress upon the work. Our author, either directly or indirectly, avails himself of the terminology as well as of many of the maxims of the Corpus Juris. Yet these maxims, so freely used, were not aliens, but rather had been naturalized in England. We are familiar with most of them. I recall: *Pater est quem nuptial demonstrant*: *Melior est conditio possidentis*: *Scienti et volenti non fit injuria*: *Expressa nocent, non expressa non nocent*: *Cessante causa, cessat effectus*.

In tracing the Roman influence we find that Brac. Bk. I. corresponds to Just. I., Tit. 1-4, 8, 9, 12. Brac. Bk. 2, ch. 1-4 and Bk. III, trac. 1, follows in general the course of Inst. III., Tit. 13-15, 18, 19, 29, and IV. Tit. 6. Yet, though this indicates that the system is Roman, we perceive that the form and arrangement are original with Bracton and are purely English.

We note that direct quotations from the Corpus Juris are not infrequent in the treatise. We find extracts from the Digest as well as the Code, although none from the Novellæ.

Bracton, however, seems to prefer to use the works of eminent glossators and jurisperdentes rather than the original texts.

We do not detect the Roman law from the direct citations made to it but rather from such an intimate knowledge of its constituent parts as enable us to discover the threads of Roman spinning which Bracton has woven into his English warp, and these threads are as much a part of the completed fabric and as English as any other part.

It is true we find excerpts of the Corpus Juris reproduced in order and with slight modifications. The student of the Corpus Juris cannot fail to note on f. 43 Brac., a great part of L. 1 ss. 2-15, D., de adquir. poss. 41, 2; and in f. 99 Brac., much is taken from Inst. 3, 13 sq., and these are not the only excerpts. In the same manner, any one familiar with the Summa of Azo will discover in Bracton whole pages literally copied from that work.<sup>1</sup>

<sup>1</sup> To copy that which was useful to men was not thought to be otherwise than meritorious in the time of Bracton.

I have stated at some length these *prima facie* evidences of foreign influence in Bracton, because it is upon these that the claim or assertion that the law of Bracton is the law of Rome rests. Upon this evidence it has even been held that Bracton was not an original or actual source of English law. Since the publication of Houard's work, various authors have vigorously attacked Bracton on account of Romanisms; but his defenders have triumphed and have well vindicated the position of his treatise among the legal classics of England.

To examine into the question for ourselves. Bracton was by no means a follower of other men's ideas; he was English to an extreme degree, as has been repeatedly shown, and as I have already instanced regarding the question of bastardy. He did not hesitate to enunciate and enforce the doctrine that the civil power was not subservient to the clerical, that the law of the Roman ecclesiastics reached no further than the limited sphere which the secular power had accorded to it.

Such was Bracton's attitude to Roman law as Roman law. Now, as to his alleged use of this law and the works of commentators upon it.

The use of Azo has been admitted. Why not? The works of this author had won a world-wide reputation, in fact had come to be received as a species of original authority, occupying at that time, in England as well as on the continent, an analogous position to that held by those of Blackstone in the justice courts, and even in higher courts of the United States, during the early part of this century. Bracton uses Azo freely, not only using the thought of that author without expressly citing him, but also frequently referring his reader to the *Summa* itself, for further information upon particular topics. "Ut in *Institutis* plenius inveniri poterit et in *Summa Azonis*," says Bracton, and this was precisely the manner in which thousands (mark the word) of American courts have used the works of Blackstone and other English writers, who occupied, in the United States, as the exponents of a more advanced system of jurisprudence than that in use here, a precisely similar position to that which Azo and a few other continental jurists held to England in the thirteenth century.

Bracton used Roman law only when it was the law of England. As has been well said: "Roman legal matter obtained reception in England, not through any legislative authority of the written sources;" "its reception was of a limited character;" "but in its sphere only second to the written law in its authority. Bracton shared the opinion of his time that the jurisprudence of Rome was that of all Christendom," "that it was in force in England as a *jus naturale* or *jus gentium*, except where supplied or displaced by general, or local usage or by English constitutions, *i. e.*, statutes."

This position of Roman law in England has in it nothing anomalous. This any one familiar with the history of American jurisprudence can not fail to perceive. The Roman law occupied in England a position which was on all fours with that enjoyed by the English law in the American colonies, and for that matter in the States of the Union. It needs but a glance at the constitutions and laws of the majority of the present States to note that they voice the sentiment held by their people, that the common law of England, save when replaced or altered by the laws of the individual State, is the law of that State. North Carolina is not the only State whose laws are in the main derived from and based upon English precedents.<sup>1</sup> This enunciation of English principles was but the expression of generally accepted doctrines. As the English law existed in America prior to its formal incorporation into the American system of jurisprudence, so the law of Rome was to be found in England at the time when Bracton wrote.

If we consider the purpose and aim of the Treatise, it corroborates our view of the use of Roman law. "Bracton laid down English law for English judges;" he aimed to give the existing law of the land in a practical and lucid manner; he sought to inculcate this law to those then ignorant of it; he says, "Qualiter et quo ordine lites deciduntur secundum leges et consuetudines;" and he indicates the materials he uses in no uncertain manner: "Facta et causus, qui quotidie emergunt et eveniunt in regno Angliæ." Professor Gütenbock points out "that

<sup>1</sup> And does any one doubt that these laws derived from England are American.

Bracton copies Roman law when it is English law, and only as such. The very errors of Bracton show Roman law as he puts it, errors and all, to have been English law." It seems almost unnecessary to give space to the idea that Roman law was used by Bracton as an embellishment to his work: the practical nature of the man and his book, completely refutes the hypothesis. It will, however, be in point to add, as an additional proof of the naturalization of such Roman law as was used by Bracton, that those legal classics which followed Bracton did not reject his so-called Roman law; they used it without question; and indeed it has been reserved for a later age to question the Englishry of the law of Bracton.

There can be no denial of the great obligation which Bracton is under to the Romans; but, as has been shown, this debt is not due by reason of the subject-matter, but of the system upon which that subject-matter is arranged. With this opinion the words of Maitland agree. In his introduction to the Note Book he says: "He [Bracton] had no intention of supplanting English by Roman law." And Güterbock summed up his argument by the statement,— "Bracton has, in general, given place to and reproduced only such Roman elements as he found were in England actually valid law, *i. e.*, actually received as such."

What has been the influence of Bracton?

His treatise was an epoch-marking one. It was the beginning of the science of law. It was unique in English jurisprudence. Clear, pointed, timely, it was an unequaled phenomenon in the history of the law of England. No one English legal work has exerted such a wide and lasting influence.

Seldon is of the opinion that, although the treatise was not published during the life-time of the author, yet it was in circulation within twenty years after his death.

That Bracton was the one authoritative work capable of quotation is shown by the line of works based upon it. The most important of these legal classics are Thornton's Abridgment of Bracton,<sup>1</sup> and Fleta.<sup>2</sup> Those works take all the matter of Brac-

<sup>1</sup> Circa 1292.

<sup>2</sup> Circa 1289.

ton, save what is manifestly regarded as surplusage by the authors. Notably, they reject the authorities cited by Bracton, thus indicating the sufficiency of Bracton as an authority and accentuating the uniqueness of the work. Britton<sup>1</sup> was a work written in French, which is thought, with much reason, to be but an abridgment of Bracton. The New Natura Brevium of Chief Justice Sir Anthony Fitzherbert<sup>2</sup> marks a stage in the extension of the influence of Bracton; for this author not only availed himself of the Treatise, but of Bracton's Note Book.<sup>3</sup> In 1569, the Treatise was edited by "T. N." and published by Richard Tottel, and of this edition a reprint appeared in 1640. During this interval Sir Edward Coke published his Institutes; and the early law of this work is derived, through Fitzherbert, from both Treatise and Note Book. Reeves, Blackstone, Spence, Stephens, as well as the grand army of writers upon legal topics, do not hesitate to express their obligation to Bracton. The judiciary joins with the text-book writers; and Chief Justice Parker voiced the opinion of the bench, though he inclined to conservatism, when, referring to a passage in Bracton, he said: "I do not say that the whole of the passage in Bracton is *now* good law; it was *all good law at the time he wrote*, and all of it that is adapted to the present state of things is good law now."<sup>4</sup>

The influence of Bracton lives through the ages. The effect of the impulse given by him to the scientific development of the law of England has not been confined to the British dominions. In no country is the influence of Bracton more plain than in the United States, where it has grown, and that of Blackstone has waned. It is true that the forms of actions of which his book treats have largely given place to others less cumbersome; but many of the legal principles are as fresh to-day, as full of life, as when he incorporated them into his phenomenal treatise; phenomenal, because in it he accomplished that which no Englishman, in the ten centuries of national life which preceded

<sup>1</sup> Circa 1297.

<sup>2</sup> Circa 1514.

<sup>3</sup> Maitland Intro. to Note Book, p. 117.

<sup>4</sup> Spence Eq. 121; Reeves, 1, 571.

him, had succeeded in doing: phenomenal, because its influence has lived through eight centuries.

Most of all, is Bracton of importance to us in that he is the man whose enunciation and practical application of the doctrine of *stare decisis* gave birth to that long line of case law which to-day is the law in the United States. I do not wish to be understood as belittling in any manner the statute law, or as maintaining the supremacy of judge-made law. I refer to the overwhelming preponderance of the doctrine of *stare decisis* in the principles applied in the trials of this country; and with this doctrine is indissolubly connected the name of the first case lawyer,—Henry of Bratton, author of *Bracton*.

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## THE CUBAN INSURRECTION AND AMERICAN NEUTRALITY.

"Peace, honest friendship, and commerce with all nations, but entangling alliances with none," was the rule laid down by the author of the Declaration of Independence to guide the policy of the new Republic in its relations with foreign powers. And Washington, in the Farewell Address, declares: "The great rule of conduct for us, in regard to foreign nations, is, in extending our commercial relations, to have with them as little political connection as possible. \* \* \* Observe good faith and justice toward all nations; cultivate peace and harmony with all." These have ever been the principles upon which the American foreign policy has been based,—a basis far enough different from that on which rested the "set of primary interests" of the nations of Europe, entanglement with which was solemnly abjured. Following after this ideal, and due to the personal efforts of Washington, to the United States belongs the great credit of being the first of the nations to give to its international obligations the sanction of positive municipal law. The Neutrality Act of 1794, made necessary by the circumstance of the war of France against England and half of Europe, grew directly out of this early determination of the United States to observe the strictest good faith and impartial justice in their attitude toward foreign nations, at peace with the United States, who might be at war *inter sese*.

The American Neutrality Act of June 5, 1794, re-enacted with greater scope and graver penalties, April 20, 1818, and strictly enforced for over a century by our government, remains to-day the effective exponent of this just *laissez faire* policy in the foreign relations of the United States. What this law is, and what its bearings upon the international obligations of the United States, in view of events now drawing the attention of the whole family of nations, it shall be my undertaking

to make plain in the present study. And more particularly, as being of more important interest, I shall discuss the broader question of the relation of the United States, in international law, and in line of the policy indicated by the egregious statesmen I have quoted, — which is the steadfast policy of this government to-day, — towards belligerent powers; and the whole question of the just and lawful course of the United States in the interesting crisis of a foreign war of independence. Although this shall be an exposition of general principles, drawn from international law and the history of American diplomatic relations, it is the application of these principles to the concrete case of the revolution in Cuba, and the enduring war between that colony and its parent-country, Spain, which gives it a timely interest and lends point to the discussion. In a matter of so high concern, it is not my part to give the color of personal views or predilections to the statement of the law, or to lean to any phase of foreign policy; but I shall seek to discover, upon authority, and faithfully expose the true principles of the law of nations applicable to the public matters of which I treat.

The scope and effect of the neutrality law may first be considered. This is a general act, applicable to the event of all wars between nations with whom the United States are at peace, whether these be foreign or civil wars, and whether between recognized belligerents or *de facto* combatants, as in the case of Cuba. But this law does not govern or restrict in any way the relations or the acts of the government, as a sovereign State or public body, such being regulated alone, in the nature of things, by considerations of policy and the rules of international law. The prohibitions and the penalties of the act are directed, in its every section, against “every citizen of the United States” and “every person who, within the territory of the United States,” shall act counter to its provisions. What the State may or may not lawfully do as respects the belligerents, is a totally different matter. There is a broad distinction in this respect between State acts of neutrals, and the acts of individuals of the neutral State, which for a clear understanding of a fundamental matter

it is well to state authoritatively. "Every participation in the war, every assistance given directly or indirectly to either of the belligerents, is interdicted to the neutral State. \* \* \* It is to the neutral State, that is to say, to its government, that this duty is incumbent. The citizens and the inhabitants of the neutral State are personally under no obligation towards the belligerents: it is only to the neutral State. There cannot therefore be, properly speaking, a violation of neutrality on their part."<sup>1</sup>

These neutrality laws need not be here cited at length; they may be readily referred to in their place, under title LXVII, "Neutrality."<sup>2</sup> They may best be summarized as so done by Chief Justice Fuller in a late leading case.<sup>3</sup> Note the italics, which I make:—

"Title 67 of the Revised Statutes, headed 'Neutrality,' embraces 11 sections, from 5281 to 5291, inclusive. Section 5281 prohibits the acceptance of commissions from a foreign power by citizens of the United States *within our territory* to serve against any sovereign with whom we are at peace. Section 5282 prohibits any person from enlisting *in this country* as a soldier in the service of any foreign power, and from hiring or retaining any other person to enlist or go abroad for the purpose of enlisting. Section 5283 deals with fitting out and arming vessels *in this country* in favor of one foreign power as against another foreign power with which we are at peace. Section 5284 prohibits *citizens* from fitting out or arming, without the United States, of vessels to cruise against citizens of the United States; and Section 5285 the augmenting of the force of a foreign vessel of war serving against a friendly sovereign. Section 5286 prohibits any person *within the territory* of the United States, from arranging any military enterprise or expedition against any power with whom we are at peace. Sections 5287 to 5290 provide for the enforcement of the preceding sections; and Section 5291, that the provisions set forth shall not

<sup>1</sup> A. Rivier, *Principes du Droit des Gens*, 1896, tome II, Sec. 68.

<sup>3</sup> *Wilborg v. United States*, 163 U. S. 634.

<sup>2</sup> Revised Statutes U. S., Secs. 5281-91, Inc.

be construed to prevent the enlistment of certain foreign citizens in the United States."

It will be noted that all the acts prohibited are only prohibited to be done within the territory of the United States. The acts prohibited therein to citizens and individuals are set out in explicit language; and there is little difficulty in its construction. Many cases have arisen under it, and wherever sufficient evidence has been adduced of its violation, it has been made effective. The most important section of the Act, and of most constant infraction, both heretofore and now, is that forbidding under penalties the formation of any military enterprise or expedition. The section reads:—

"5286: Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars and imprisoned not exceeding three years."

The chief difficulty in this section turns upon the determination of what is or is not such *malum prohibitum*. What constitutes its violation? As has been aptly said:—

"It is impossible to lay down any hard and fast line separating commercial transactions in munitions of war, and the organizing of hostile expeditions. International law is necessarily incapable of being defined and laid down with the precision attainable by municipal law. The question is one of intent, and it is the duty of the neutral government to exercise due diligence in ascertaining what the true character may be."<sup>1</sup>

Such character depends upon the facts and circumstances of each case, and the intention of those engaged in the undertaking. I will, however, quote from the Wiborg case (*ubi supra*; decided May 25, 1896) this succinct declaration of what is *not* within the prohibition of the Act:—

"Nor is it important that they (persons leaving the United

<sup>1</sup> Boyd, Wheaton, Int. Law, Sec. 489aa.

States for the scene of war) intended to make war as an independent body or in connection with others. Where men go *without combination and organization* to enlist as individuals in a foreign army, they do not constitute such military expedition; and the fact that the vessel carrying them might carry arms as merchandise would not be important."

The whole question of military expeditions is ably discussed, and the cases fully reviewed, in the Wiborg case above. I may also cite as very interesting, the cases of "*The Mexico*,"<sup>1</sup> "*The Itata*";<sup>2</sup> and *United States v. O'Brien*.<sup>3</sup>

#### WHAT THE NEUTRALITY ACT DOES NOT PROHIBIT.

More interesting, and more important, than the positive prohibitions of the Neutrality Act, are the acts which it does not prohibit; that is, lawful acts of direct aid rendered by neutral individuals to either one or both of the parties belligerent, such as furnishing them money, arms, and munitions, the sinews of war, and of personal service in one or the other army. All this is clearly lawful, by the positive law of nations, and affords to neither party the right to complain to or against the government of the offending individuals. Persons are not prohibited from going out of the country to enlist in the service of a foreign army, or with rebels; and the transportation of such persons, and of arms, ammunition, and the munitions of war, is not contrary to law or practice. Says Rivier: "In regard to individuals, subjects or inhabitants of the neutral State, they remain free, on principle, to trade in every kind of merchandise, in time of war as well as in time of peace, with all persons whatsoever, and especially with the belligerents or either of them."<sup>4</sup> The Supreme Court of the United States, in the late Wiborg case, declares with all the weight of its authority, that a formidable number of overt acts of aid and participation are not contrary to the neutrality laws of the United States,—nor for that matter, against the law of nations. Here is a catalogue of some

<sup>1</sup> 24 Fed. Rep. 83.

<sup>2</sup> 5 C. C. A. Rep. 608.

<sup>3</sup> 75 Fed. Rep. 907.

<sup>4</sup> Principles, II, Sec. 69.

of the impune acts of neutral individuals, stated in the language of the Court:—

“It is not a crime or offense against the United States, under the neutrality laws of this country, for individuals to leave the country with intent to enlist in foreign military service;

“Nor is it an offense against the United States to transport persons out of this country, and to land them in foreign countries, when such persons had an intent to enlist in foreign armies;

“It is not an offense against the laws of the United States to transport arms, ammunition, and munitions of war from this country to any foreign country, whether they are to be used in war or not;

“It is not an offense against the laws of the United States to transport persons intending to enlist in foreign armies, and munitions of war on the same trip.”<sup>1</sup>

And the only penalty is in case of being caught by the contrary belligerent, who under his right of seizure of contraband, is on the alert to prevent warlike supplies reaching his enemy. This rule is stated by the Federal court thus, on July 1st, 1896, in a Cuban filibustering case:—

“In such case, the shipper and transporter of the arms, ammunition and munitions of war only run the risk of capture and seizure of such arms, etc., by the foreign power against whom the arms were intended to be used.”<sup>2</sup>

All this is not only not forbidden by our Neutrality Act, but all such acts are permitted with the positive sanction of the general law of nations. This is declared by the concurrence of every authority, and has been the constant tenet of our Department of State. I shall cite but an instance or two. This principle was admirably stated on reason by Thomas Jefferson, when Secretary of State in the Cabinet of Washington, in reply to the complaints of the British government against the sale of arms and munitions of war by citizens of the United States to France, then at war with England:—

“Our citizens have always been free to make, vend and export

<sup>1</sup> *Wiborg v. United States*, 168 U. S. 634.

<sup>2</sup> *United States v. O'Brien*, 75 Fed. Rep. 907.

arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement of their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned."<sup>1</sup>

The same rule applies to supplies of money as well as to arms and munitions. Both alike are sinews of war and are simple contraband. Mr. Lawrence, the great English authority, thus affirms: —

"Money is a form of merchandise, and neutral individuals constantly trade in it with belligerent governments. Commercial transactions in it could not be prevented, except by an amount of espionage and interference which would outrage human nature and render all trade impossible. The stock in loans issued to provide funds for the conflict is bought and sold in other countries, just as freely as shares in foreign mines and railways. Money is contraband of war, and must be treated like other articles in the same category."<sup>2</sup>

To prevent, if possible, these contraband transactions with their enemies, the only penalty for which, as we have amply seen, is liability to seizure and confiscation, the belligerents must do their own patrolling of the high seas to apprehend offenders. It is in obedience to this rule that Spanish cruisers patrol to-day the waters of the Indies, on the *qui vive* for arms and munitions sent by American sympathizers to the Cuban patriot revolutionists.

But I must say here, that this right of a belligerent to stop and search neutral merchant vessels on the high seas in search of

<sup>1</sup> Mr. Jefferson to Mr. Hammond, May 15, 1793.

<sup>2</sup> *Ibid.*, Sec. 254.

contraband of war carried to its enemy, is strictly limited to the status of declared warfare and recognized belligerents. It is not at all permitted in a civil conflict where insurgents have not yet been recognized as belligerents by neutral States. So that Spain, in the present Cuban revolution, has not the right to stop and search American or other foreign vessels on the high seas, or to seize warlike supplies sent to the Cubans: except it be within her jurisdictional three-mile limit, or upon their being landed upon Cuban soil. This is an important disability, and handicaps Spain in her efforts to prevent American aid to the revolutionists. Mr. Dana makes this plain, speaking of the effects of the according of belligerent rights. If the armed civil contest, he says, is a recognized war, then "the commissioned cruisers of both sides may stop, search and capture the foreign merchant vessel (carrying contraband), and that vessel must make no resistance, and must submit to adjudication by a prize court; if it is not (such recognized) war, the cruisers of neither party can stop or search the foreign merchant vessel: and that vessel may resist all attempts in that direction, and the ships of war of the foreign State may attack and capture any cruiser persisting in the attempt." Spain would thus gain one important advantage by the recognition by the United States of the belligerency of the Cubans, the right to effectively prevent (if she could) American filibustering aid to the Cubans, by intercepting the suspected vessels on the high seas.

It is no part of the neutral's duty to prevent these acts, so long as they do not violate the neutrality laws, — or to help in catching the actors. The eminent French publicist whom I have quoted, writing in this present year, declares, to use his own words:—

"L'Etat neutre n'est point obligé de surveiller ses ressortissants hors du territoire, ni de faire à l'étranger, soit dans un autre pays, soit en pleine mer, la police pour les belligérants, ce qui d'ailleurs lui serait le plus souvent impossible. C'est aux belligérants eux-mêmes qu'il appartient d'agir directement à l'encontre des faits qui leur sont perpétrés par des sujets d'Etats neutres hors de territoire neutre. L'Etat neutre ne protégera pas son national qui aura commis des actes contraires



à la neutralité, pour autant du moins que le belligérant se tiendra dans les limites de la répression légitime.”<sup>1</sup>

The conclusion of the whole matter, in its jural as well as moral relations, is admirably summed up by Chancellor Kent, in this axiomatic statement: “It is a general understanding that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality by the neutral sovereign himself. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act.”<sup>2</sup>

To make a concrete application of these principles of international law, it follows from the arrayed authorities, that our Neutrality Act is strictly limited to the positive prohibitions therein enacted; and that furnishing arms, munitions, or money aid to either party to the Cuban revolution, or other war, or going abroad to enlist in either army, whether openly or secretly, so long as there is no enlistment or military organization within the territory of the United States, is not a breach of neutrality nor contrary to the law of nations; and only subjects those concerned to the hazards of war, and their equipments to being seized as contraband of war if apprehended *in transitu*.

#### BELLIGERENCY AND THE RIGHT OF RECOGNITION.

Belligerency is a physical fact, not a legal refinement. Ordinarily, there is and can be no question as to the fact of war; neyer so as between sovereign nations. The fact of belligerency between independent States forces its own recognition. A state of peace between nations gives way to a conflict of arms; this is war; and immediately all the incidents and rules of the international law of war come into operation. It is at once incumbent upon all other nations not parties to the conflict, to announce their attitude towards the belligerents, either as allies of one party or the other, or as neutral towards both; and this latter is usually done by a proclamation of neutrality or by silent acqui-

<sup>1</sup> A. Rivier, *Principes du Droit des Gens*, tome II, Sec. 213.

<sup>2</sup> 1 Kent, 142; *The Santissima Trinidad*, 7 Wheaton, 283.

essence. It is only in cases of internal conflict within the body of a State, of insurrection, rebellion or revolution, civil strife, that the question with which we here deal arises, that is, the *status* of belligerency, and the right of the recognition of the fact by other nations. This is a very delicate question, for it involves in some sense a violation of the radical principle of the absolute independence of every sovereign, and his right to manage his own internal affairs without the interference of third parties having no right or interest in his concerns.

But, as indicated, there are important exceptions to this rule, when it often becomes the right, and indeed the duty, of other nations to interfere to greater or less extent. The most usual as well as mildest form of this intervention is by what is known as the recognition of belligerency.

A first consideration, it would seem, towards determining the right to accord recognition of belligerency, is what is the nature of the internal disturbance in the State, and its extent. On this hangs the law. An understanding of this matter will materially aid to a right knowledge of general principles, and a just application of principles to the concrete case of Cuba.

With the minor disorders within a State, such as local outbreaks and seditious risings, evidently foreign nations have nothing to do; and outside interference or encouragement to rebellion would be a highly unfriendly act, and even a just *casus belli*. But where the internal struggle has grown to revolution, where one party has made a declaration of its independence, and seeks to achieve political liberty, and where civil war is rife, then the interests of the whole family of nations are involved, and they have the right to determine what attitude they shall bear towards the *de facto* combatants. This right is aptly stated by the French jurisconsult already quoted:—

“If the insurgents have organized themselves in form of a State, if they have a collective will, if they are masters of a part of the territory, which they defend and maintain against the forces of the government, then foreign States are authorized to consider the disrupted State, in all that concerns the intestine struggle, as being divided, at least momentarily; and not to longer regard it as one government engaged with rebels, but as

two governments, and as two States confronting and at war with one another; they may thus recognize the insurgents in the character of belligerents. If they do so, and only as to those who so do, the civil war becomes a war between States, governed by the rules of war.”<sup>1</sup>

Of course, if the government of the insurgents sees fit, of its own motion, to accord to the insurgents belligerent rights, that fixes their status with regard to all other powers as well. This rule is thus stated:—

“After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war, with all its consequences, as regards neutrals. They cannot ask a court to affect a technical ignorance of the existence of a war.”<sup>2</sup>

As a civil war is never proclaimed, *eo nomine*, against insurgents, its actual existence is a *fact* of which every nation must, as it were, take judicial notice and knowledge, as many of its rights and interests, and those of its citizens, may be thereby seriously affected. The Supreme Court of the United States, in a great case, recognized a right principle:—

“It is not the less a civil war, with belligerent parties in hostile array, because it is called an ‘insurrection’ by one side, and the insurgents be considered as rebels and traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it a war by a declaration of neutrality. The conditions of neutrality cannot exist unless there be two belligerent parties.”<sup>3</sup>

Belligerency and war in Cuba are facts, the existence of which, *flagrante bello*, cannot be denied or overlooked. The President of the United States finds himself twice forced to look this fact in the face. He proclaims, on June 12th, 1895, that “the Island of Cuba is now the seat of serious disturbances, accompanied by armed resistance to the authority of the established government of Spain, a friendly power,” etc.

<sup>1</sup> Rivier, Principes, tome 2, Sec 177.

<sup>2</sup> Prize Cases, 2 Black, U. S. 635.

<sup>3</sup> Prize Cases, 2 Black, U. S. 635.

And after a year of armed warfare, again on July 27th, 1896, he proclaims, "said civil disturbances and armed resistance to the authority of Spain continue to exist" ; both times pronouncing the severe penalties of the law against all American citizens who violate the Neutrality Act. Yet again, in his message to Congress, December 7th, 1896, he declares that "The insurrection in Cuba still continues to exist with all its perplexities. Spain has not yet re-established her authority," and he urges the "stability two years' duration has given the insurrection," to show the unreasonableness of Spain's demand of "unconditional surrender on the part of the insurgent Cubans" before their autonomy is conceded. Yet he assures Congress that the "proposition that belligerent rights should be accorded to the insurgents" is, and has even been abandoned because "untimely, and in practical operation clearly perilous and injurious to our own interests." I make no comments on this; the principles of the law of nations I have cited and will cite in continuation may be applied by the reader.

This brings us squarely to the question of the circumstances which entitle a revolutionary body to the recognition of belligerency, and which justify neutral powers in according it to them. The war may rage and continue *de facto* without such recognition; and it is not important whether the parties be independent States or civil factions. The Supreme Court of the United States, in the case just cited, states this rule, and makes plain, too, the nature and extent of the civil conflict, which will justify, by the law of nations, the recognition of *de jure* belligerency, and the according of its corresponding rights by foreign powers; the court saying: —

"It is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other. Insurrection against a government may or may not culminate in an organized rebellion; but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents — the number, power, and organization of the persons who originate and carry it

on. \* \* \* When a party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State; while the sovereign treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason." <sup>1</sup>

Mr. Dana, in his lucid notes on Wheaton, says that in such a state of things, as an organized revolution and a *de facto* government, contending publicly with the sovereign, the liability to political complications, and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers, seem to require an authoritative and general decision as to the status of the three parties involved. And to justify this recognition, Mr. Lawrence pointedly declares: "Two conditions are necessary. The struggle must have attained the dimensions of a war, as wars are understood by civilized States; and the interests of the power which recognizes must be affected by it." Chancellor Kent states with precision the rule as to how belligerency is regarded, and when to be recognized: —

"It has been the constant practice of European nations, and of the United States, to 'look upon belligerency as a fact rather than as a principle,' holding with Mr. Canning, that 'a certain degree of force and consistency acquired by a mass of population engaged in war entitled that population to be treated as belligerents.' " <sup>2</sup>

This rule was stated by Mr. Canning in 1826 on the occasion of the Greek war of independence against Turkey; and has been the "constant practice" of the United States in the recognition as belligerents of all the South American dependencies of Spain, in the cases of Greece, Mexico, Hayti, the Republic of Texas, Hungary, Hawaii, Brazil, and all the other peoples who in this century have fought for liberty against despotisms, in the

<sup>1</sup> Prize Cases, 2 Black, U. S. 635.

<sup>2</sup> Abdy's Kent, 94.

Americas and in nearly every State of modern Europe. This rule President Jackson reiterates, in his message to the Senate, December 22, 1836, during the Texas-Mexico war: "All questions relative to the government of foreign nations, whether of the old or new world, have been treated by the United States as questions of fact only." And so declared President Grant, in his seventh annual message to Congress, 1875, referring to the then insurrection in Cuba: —

"The question of according or withholding rights of belligerency must be judged, in every case, in view of the particular attending facts. \* \* \* Belligerency, too, is a fact."

A citation or two of the authoritative language of our State Department on several important occasions, showing what has been policy of our government in such cases, must suffice to finish this subject.

Mr. Monroe said, speaking of the South American revolutions against Spain:—

"As soon as the movement assumes such a steady and consistent form as to make the success of the Provinces probable, the rights to which they are entitled by the law of nations, as equal parties to a civil war, have been accorded them."<sup>1</sup>

Secretary Forsyth said:—

"It has never been held necessary, as a preliminary to the extension of the rights to either, that the chances of war should be balanced, and the probabilities of eventual success determined. For this purpose it has been deemed sufficient that one party had declared its independence, and at the time was actually maintaining it."<sup>2</sup>

The question of recognition, as we have seen, is one of policy, and the interests of the recognizing government, as well as considerations for the armed combatants. We have seen that it has been the "constant practice" and policy of the United States government for over a century, to accord recognition and its rights, always, in the words of President Monroe: "As soon as the movement assumes such a steady and consistent form as to make the success of the provinces probable."

<sup>1</sup> Cited by Woolsey Int. Law, App. III., note 19.

<sup>2</sup> Sec. Forsyth to Gorostiza, Sept. 20, 1836.

A strong statement of the question of recognition being a matter of interests involved, is made by the eminent English authority, Mr. Hall, who says, summing up many precedents:—

“The right of a State to recognize the belligerent character of insurgent subjects of another State, must then, for the purposes of international law, be based solely upon a possibility that its interests may be so affected by the existence of hostilities in which one party is not in the enjoyment of belligerent privileges, as to make recognition a measure of reasonable self-protection. As a matter of fact, this condition of things may arise so soon as hostilities approach the borders of the State which is their scene; and it is inseparable from their extension to the ocean.”<sup>1</sup>

It is almost idle, in the light of facts that all the world knows, to ask are not American interests involved in and affected by the struggle going on these two years in Cuba for independence. Even so affirms the President of the United States in his final message of December 7, 1896, to Congress. He declares first that: “The inevitable entanglements of the United States with the rebellion in Cuba, the large American property interests affected, and considerations of philanthropy and humanity in general, have led to a vehement demand in some quarters (the whole country) \* \* \* that belligerent rights be accorded to the insurgents.” He then details in striking language the very great extent of the American interests involved and suffering by reason of the *de facto* war there raging, declaring:—

“The spectacle of the utter ruin of an adjoining country, by nature one of the most fertile and charming on the globe, would engage the serious attention of the government and people of the United States in any circumstances. In point of fact, they have a concern with it which is by no means of a wholly sentimental or philanthropic character. It lies so near to us as to be hardly separated from our territory. Our actual pecuniary interest in it is second only to that of the people and government of Spain. It is reasonably estimated that from \$30,000,000 to \$50,000,000 of American capital are invested in plantations and in railroad, mining and other business enterprises on the island.

<sup>1</sup> Hall, International Law, Sec. 5.

The volume of trade between the United States and Cuba, which in 1889 amounted to about \$64,000,000, rose in 1893 to about \$103,000,000, and in 1894, the year before the present insurrection broke out, amounted to nearly \$96,000,000. Besides this large pecuniary stake in the fortunes of Cuba, the United States finds itself inextricably involved in the present contest in other ways both vexatious and costly."

#### THE EFFECTS OF RECOGNITION OF BELLIGERENCY.

What, after all, are the legal and practical effects of the recognition of belligerency, and what the rights accorded to the belligerents by that State act? What are belligerent rights? The effects of recognition and the change of *status* of the insurgents, and in the relations between both parties combatant and the recognizing power, are very practical, and as between the combatants, of momentous importance. I shall briefly answer these questions upon the consensus of authority. The rights of belligerents are those recognized by the law of nations, and accorded by the laws of war to armed enemies engaged in lawful, public war. In the exercise of these rights no acts of either party, within the rules of war, are criminal acts; and both parties are exempt from all civil liabilities for acts done in pursuance of these rights; which may extend to taking, and if necessary, destroying the persons and property of the enemy. Such acts, when done by those not lawful belligerents, are under the ban of all nations; they are murder, robbery and piracy, and the actors are outlaws from the laws of nations. An admirable statement of these distinctions is found in a high authority:—

"If the contest is a war, all foreign citizens and officers, whether executive or judicial, are to follow one line of conduct; if it is not a war, they are to follow a totally different line. If it is a war, the commissioned cruisers of both sides may stop, search, and capture the foreign merchant vessel (carrying contraband), and that vessel must make no resistance, and must submit to adjudication by a prize court; if it is not a war, the cruisers of neither party can stop or search the foreign merchant vessel; and that vessel may resist all attempts in that direction,



and the ships of war of the foreign State may attack and capture any cruiser persisting in the attempt. If it is war, foreign nations must await the adjudications of prize tribunals; if it is not war, no such tribunal can be opened. If it is war, the parent State may institute a blockade *jure gentium* of the insurgent ports, which foreigners must respect; but if it is not a war, foreign nations having large commercial intercourse with the country will not respect a closing of insurgent ports by paper decrees only. If it is a war, the insurgent cruisers are to be treated by foreign citizens and officials, at sea and in port, as lawful belligerents; if it is not a war, those cruisers are pirates, and may be treated as such. If it is war, the rules and risks respecting carrying contraband, or dispatches, or military persons, come into play; if it is not war, they do not. Within foreign jurisdiction, if it is a war, acts of the insurgents in the way of preparation and equipments for hostility may be breaches of the neutrality laws, while, if it is not war, they do not come into that category, but under the category of piracy or of crimes by municipal law."<sup>1</sup>

It seems clearly to the interest of humanity and civilization that this recognition be promptly accorded to all *bona fide* combatants, who are engaged in organized *de facto* warfare against a discarded sovereignty. As Mr. Lawrence aptly states: "War exists as a fact, and interested States must open their eyes to it. This they do by according to the incipient political community what is known as recognition of belligerency;" adding: —

"The effect of this action is to endow the community with all the rights and all the obligations of an independent State so far as the war is concerned, but no further. Its armies are lawful belligerents, not banditti; its ships of war are lawful cruisers, not pirates; the supplies it takes from invaded territory are requisitions, not robbery; and at sea its captures made in accordance with maritime law are good prize, and its blockades must be respected by neutrals."<sup>2</sup> The Supreme Court of the United States declared and applied this rule in a case growing out of the South American revolutions against Spain, where the

<sup>2</sup> Dana's Wheaton, Sec. 28.

<sup>1</sup> Lawrence Int. Law, Sec. 53.

United States had accorded belligerent rights to the colonies, saying: —

“It may be said generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.”<sup>1</sup>

But there are other consequences of recognition, which affect more particularly the power according the recognition; and it may be to these that the President alluded, when in terms of “glittering generality” he declared that the recognition of the Cubans would be “perilous and dangerous to our own interests.” For, so long as insurgents are not recognized as belligerents, and for the purposes of the war considered as independent States, the existing sovereign is alone looked to by third powers, as the responsible head of the State. He and his established government are responsible to other governments for all acts of injury inflicted by his rebellious subjects upon the persons and property of foreign citizens, on land and sea. As in the present case, the immense damages and destruction of American property in Cuba, running into the millions, are lawful demands against the government of Spain. On the other hand, “so soon as recognition takes place, the parent State ceases to be responsible to such States as have accorded recognition, and when it has itself granted recognition, to all States, for the acts of the insurgents, and for losses and inconveniences suffered by a foreign power or its subjects in consequence of the inability of the State to perform its international obligations in such parts of its dominions as are not under its actual control.”<sup>2</sup>

This plenary absolution was the consoling feature of England’s recognition of the belligerent Confederacy against the protest of the United States; Mr. Adams, minister in London, saying in his dispatch of June 14, 1861, to Secretary Seward: —

“At any rate there is one compensation; the act has released the government of the United States from responsibility for any misdeeds of the rebels towards Great Britain. If any of their

<sup>1</sup> U. S. v. Palmer, 3 Wheaton, 635.

<sup>2</sup> Hall Int. Law, Sec. 5.

people should capture or maltreat a British vessel on the ocean, the reclamation must be made only on those who had authorized the wrong. The United States government would not be liable."

Prior to recognition of belligerency, insurgents have no rights of legation or diplomatic representation towards any foreign power; and only in a qualified way after recognition; for such rights belong alone to independent States. It is true, that prior to the acknowledgment by the United States of the independence of the southern Spanish-American colonies, informal agents were sent to them by the President; but diplomatic agents from several of these States were refused at the same time official reception at Washington, though personally received.<sup>2</sup> Secretary Seward took the ground "that the United States government would decline to hold intercourse, official or unofficial, with agents of insurgents against governments with whom the United States are at peace. But when a belligerent is recognized as such, this implies an intercourse, at least between agents in reference to terms of belligerency. This intercourse may be very informal, and, when between belligerents who are parties to a civil war, may for a time be limited to negotiations for exchange of prisoners of war and for cognate objects."

This is a summary view of the questions of belligerency, and the right and effects of its recognition. The question on the whole is political; it belongs to the executive and legislative departments of governments; the judiciary being bound to follow the determinations of the political power; and until a formal recognition, to hold the ancient order of things as still existing. This consideration makes political action in many cases of prime importance. With us now, in the Cuban situation, a grave case has arisen. A few weeks ago, an American vessel, "The Three Friends," engaged in carrying contraband of war to the revolutionists, was fired upon by a Spanish cruiser off the coast of Cuba, and returned the fire. This was an act, *stricti juris*, of the highest piracy and outlawry. The vessel has been seized by

<sup>2</sup> See Wharton International Law Digest, Sec. 69, where this whole matter is treated.

the United States government, and libeled in an American port for the high crime. Criminal, because "injury to our own interests" stands supposedly in the way of according belligerent rights to the Cuban Republic, proclaimed May 3d, 1895, and maintained for two years against 200,000 troops of Spain, which, despite all, "has not yet re-established her authority" over the revolutionary patriots of Cuba Libre.

JOSEPH WHELESS.

ST. LOUIS.

VOL. XXXI.

6

## UNDER WHAT CIRCUMSTANCES A SERVANT ACCEPTS THE RISK OF HIS EMPLOYMENT.

This is a very large and a very difficult question. Leaving out of view certain exceptions to the general rule, it may be said that the decisions present two theories which are contradictory and irreconcilable, but which are, nevertheless, sometimes found expounded in different judgments of the same court. One of these theories is that a servant, by entering the service of his master or continuing therein, is conclusively presumed to accept the risk of all the dangers which are known to him, or which, by the exercise of reasonable care and attention with the view of promoting his own safety, he ought to know; and this wholly without reference to the question whether such dangers spring from the negligence of the master or not. A correlative proposition is that a servant is not deemed to accept those risks, proceeding from the negligence of the master, which the servant does not know or could not discover by the exercise of reasonable care and attention, with a view of promoting his own safety, but which the master does know, or which he could discover by the exercise of reasonable care and attention in discharging his obligation of protecting his servant. The second rule, and one which is contradictory to and irreconcilable with the first, is that the servant is not, by entering the service of his master or continuing therein, conclusively deemed to accept the risk of a known danger, unless the character of the danger or the circumstances of the service are such that it threatens immediate injury. If it does not threaten immediate injury, but if, on the contrary, he might reasonably suppose that he could continue in the service without incurring injury from the danger by the exercise of great caution or skill therein, he is not conclusively deemed to accept the risk; but whether he does so will be a question of fact for a jury. To show the extent to which one court has vacillated between these two doctrines, two recent decisions of that court

will be referred to. In one of them the court, abandoning some of its previous holdings and following others, announced the second rule which I shall call the "imminent danger rule" in the following language:—

"It has been several times held by this court, that where the instrumentality with which the servant is required to perform service is so glaringly defective that a man of common prudence would not use it, the master could not be held responsible for damages from it. But if the servant incurs the risk of machinery which, though dangerous, is *not so much so as to threaten immediate injury*, or where it is reasonable to suppose that it may be safely used with great care or skill, a different rule applies. In such cases, mere knowledge of the defect will not defeat a recovery. Negligence, on the part of the servant, in such cases, does not necessarily arise from his knowledge of the defect; but it is a question of fact, to be determined from such knowledge, and other circumstances in evidence."<sup>1</sup>

In the later case the same court at a later period affirmed, in a *per curiam* opinion, a minority opinion of the St. Louis Court of Appeals, written by Judge Rombauer, in which that very learned and able judge denied the "imminent danger" doctrine in the following language:—

"It may be said that the question whether the danger was apparent was, in this case, submitted to the jury in an instruction of the court; but how can a question be submitted to the jury for their finding, concerning which there can be no possible controversy? The instruction says 'apparent and threatening,' as if the court considered that a danger perfectly apparent was not enough, but that it must also be *threatening*, whatever that may mean in this connection. It is a matter of daily experience, of which many courts have taken judicial notice, that a submission of a case of this class to the jury always leads to the same result. To relieve the distress of *others* is a commendable impulse, which juries are but too apt to follow, although they must necessarily do it at the expense of others. They are apt to forget that judicial authority under the guise of law, and at the expense of others, is but an act of licensed oppression."<sup>2</sup>

<sup>1</sup> Huhn v. Missouri &c. R. Co., 92 Mo. 440, 447. s. c. affirmed 117 Mo. 475, 502. A strong application of the same doctrine is found in the subsequent decision.

<sup>2</sup> Fugler v. Bothe, 48 Mo. App. 44;

Still later the court in two decisions went back to the "imminent danger" doctrine.<sup>1</sup>

The attitude of that court toward the doctrine, as shown by some of its prior decisions, may be judged of by the following language, which is quoted from an opinion of Judge Napton:—

"If the risk is such as to be perfectly obvious to the sense of any man, whether servant or master, then the servant assumes the risk. But if it is a case where no such obvious risks are incurred, and where it was fair to presume that the employé had been guilty of no negligence, the rule of law, as well as of common sense and justice, is that the master is responsible for damages, if any ensue."<sup>2</sup>

The contrast of this doctrine to the doctrine of the later case of *Huhn v. Missouri &c. R. Co.*,<sup>3</sup> will be understood when it is stated that Huhn was hurt by catching his foot in an unlocked railway switch, with which he was perfectly familiar and the dangers of which he well knew. Earlier decisions of the same court, holding the servant to the severe rule of accepting the risk of known dangers, will be found in two overhead railway bridge cases.<sup>4</sup> In both of these cases railway brakemen, stationed on the top of freight cars, knew of the existence of an overhead bridge not high enough for them to pass under it while standing on the car or sitting on the brake handle. But they forgot the existence of the bridge or the position of the train, and were struck by it and killed; and it was held that there could be no recovery of damages because the risk was one which they had accepted.

If my own views upon this question could be of the least importance to the profession, my previous writings would indicate what they must be. They are in substance the same as the views of Judge Biggs, announced in an opinion of the St. Louis Court of Appeals (reversed by the

ion of the St. Louis Court of Appeals in *Berning v. Medart*, 56 Mo. App. 443, opinion by Rombauer, P. J. See also *Williams v. St. Louis &c. R. Co.*, 119 Mo. 816; *Lucey v. Hannibal Oil Co.*, 129 Mo. 32, 40; *Nugent v. Kauffman Milling Co.*, 181 Mo. 241.

<sup>1</sup> *Settle v. St. Louis &c. R. Co.*, 127

Mo. 836, 844; *Holloren v. Union Iron &c. Co.*, 35 S. W. Rep. 260, 262.

<sup>2</sup> *Keegan v. Kavanaugh*, 62 Mo. 230.

<sup>3</sup> 92 Mo. 440.

<sup>4</sup> *Devitt v. Missouri &c. R. Co.*, 50 Mo. 202; *Rainès v. St. Louis &c. R. Co.*, 71 Mo. 164.

Supreme Court of Missouri), in which I concurred.<sup>1</sup> That view is, that where the master, through negligence or wantonness, exposes his servant to a danger, the servant, or his widow or administrator, ought not to be precluded from recovering damages for his injury or death in consequence of that danger, where the servant is brought into contact with the danger without serious fault on his part, but in consequence of what may fairly be ascribed to the inadvertence of being absorbed in his work, or to the mistakes or accidents incident to his employment. I do not want my professional brethren to think for one moment that I balance the life of a railway brakeman against the slight expense to a railway company of blocking its frogs and switches. I should be sorry to have them think that I ever was willing to balance the life of a railway brakeman against the slight expense to a railway company of building the upper works of its bridges sufficiently high for a brakeman to stand upon the top of his car without coming in contact with them. These are murder-machines; and the rule of judge-made law which holds the servant at all times and under all circumstances, bound to avoid them at his peril, is a draconic rule. It is destitute of any semblance of justice or humanity. It is cruel and wicked. It illustrates the subserviency of the American judiciary to the great corporations. I go further: I hold that the law ought to recognize a difference in position between the wealthy employer and the indigent servant. The law recognizes a difference in position between the usurer and the borrower, and it limits the amount which the usurer may take for the forbearance of his money. But it puts the wealthy capitalist, corporate or unincorporate, upon the same equality in this respect, as that of the starving laborer, who must carry his meager dinner pail to his employment, no matter how dangerous it may be, in order to get a little food, clothing and shelter for his suffering family. Though I do not find words sufficient to voice my feelings upon this subject, I do not intend, during the little of life which remains to me, to speak about it with bated breath; nor do I intend in the least to conform my views with

<sup>1</sup> *Fugler v. Bothe*, 43 Mo. App. 44; *s. c.* reversed 117 Mo. 475.



reference to it to the opinions of others. Those who can reconcile their consciences to the cold brutality of the general rule with reference to the servant accepting the risk, are at liberty to do so; I envy neither their heads nor their hearts. To show the state of the doctrine which they find compatible with their judgments and consciences, I now propose to cite a few of the decisions: in a future article, if the time serves me, I shall develop some of the opposing views of the judges.

Stated in general terms, this doctrine is, that a servant who *knows* that his employment is dangerous in any given particular, whether proceeding from defective machinery, defective methods of work, insufficient help, the negligence of fellow-servants, or any other cause, accepts the risk of being hurt by reason of such causes or dangers, and if he is hurt there can be no recovery of damages; and this wholly without inquiry whether the danger arose from the negligence of the master, or whether it was one of the natural incidents of the employment. This rule is equally applicable to cases where the danger is known to the servant, without reference to the manner in which his knowledge was acquired, and where it was such that he ought, by exercising reasonable care for his own safety, to have discovered it.<sup>1</sup>

It is a part of this rule that where the servant knows the default

<sup>1</sup> Sherwood, C. J., in *Alcorn v. Chicago &c. R. Co.*, 108 Mo. 81; *Aldridge v. Midland Blast Furnace Co.*, 78 Mo. 559; *Devitt v. Pacific Railroad*, 50 Mo. 302 (overhead bridge case); *Rains v. St. Louis &c. R. Co.*, 71 Mo. 164 (another overhead bridge case); *Moore v. St. Louis Wire Mill Co.*, 55 Mo. 491; *Watson v. Kansas &c. Co.*, 52 Mo. App. 366; *Claybaugh v. Kansas &c. R. Co.*, 56 Mo. App. 630; *Smith v. St. Louis &c. R. Co.*, 69 Mo. 82; *Covey v. Hannibal &c. R. Co.*, 86 Mo. 635; *Fugler v. Bothe*, 117 Mo. 475 (reversing *s. c.* 43 Mo. App. 44, and overruling *Jones v. St. Louis &c. R. Co.*, 43 Mo. App. 398); *Berning v. Medart*, 56 Mo. App. 443; *Price v. Hannibal &c. R. Co.*, 77 Mo. 508; *Porter v. Hannibal*

*&c. R. Co.*, 71 Mo. 66; *Gutridge v. Missouri &c. R. Co.*, 105 Mo. 520; *O'Mellia v. Kansas City &c. R. Co.*, 115 Mo. 205; *Coontz v. Missouri &c. R. Co.*, 115 Mo. 669; *Flynn v. Union Bridge Co.*, 42 Mo. App. 530; *Reichla v. Gruenfelder*, 53 Mo. App. 43; *Watson v. Kansas &c. Co.*, 52 Mo. App. 366; *Wells v. Coe*, 9 Colo. 159; *Heath v. Whitebreast &c. Coal Co.*, 65 Iowa, 737; *Umbach v. Michigan &c. R. Co.*, 83 Ind. 191; *Galveston &c. R. Co. v. Garrett*, 73 Tex. 202; *Smith v. Winona &c. R. Co.*, 42 Minn. 87; *Lofrano v. New York &c. Water Co.*, 55 Hun. (N. Y.), 452; *Nadau v. White River Lumber Co.*, 76 Wis. 120; *Gulf &c. R. Co. v. Williams*, 73 Tex. 159; *Latremouille v. Bennington, &c. R. Co.*, 63 Vt. 336

of his master in providing defective or unsuitable or dangerous machinery or appliances, but nevertheless voluntarily enters upon the employment, or after acquiring such knowledge continues therein, there can be no recovery of damages from the master for any hurt to the servant arising from such default.<sup>1</sup>

The rule, moreover, extends to all dangers or defects which are patent and obvious to a person possessing the knowledge and experience of the particular servant, whether he be an *infant* or an *adult*.<sup>2</sup>

In these last cases, the danger being open and obvious, a knowledge of it on the part of the servant is presumed, and if

<sup>1</sup> Devitt v. Pacific R. Co., 50 Mo. 302 (overhead bridge case); Rains v. St. Louis &c. R. Co., 71 Mo. 164 (another overhead bridge case); Naylor v. New York &c. R. Co., 33 Fed. Rep. 801; Dalton v. Atlanta &c. R. Co., 4 Hughes (U. S.), 180; Schultz v. Chicago &c. R. Co., 67 Wis. 616; Kuhn v. Wisconsin &c. R. Co., 70 Iowa, 561; Trainor v. Philadelphia &c. R. Co., 137 Pa. 148; Baltimore &c. R. Co. v. Stricker, 51 Md. 47; Kelley v. Silver Spring &c. Co., 12 R. I. 112; Coal Creek Mining Co. v. Davis, 90 Tenn. 711; La Pierre v. Chicago &c. R. Co., 99 Mich. 312; Carey v. Sellers, 41 La. Ann. 500; Hoge v. Wilson, 5 Wash. 160; s. c. 31 Pac. Rep. 469; Monaghan v. New York &c. R. Co., 49 Hun (N. Y.), 113.

<sup>2</sup> Fulger v. Bothe, 117 Mo. 475 (reversing s. c. 43 Mo. App. 44); Claybaugh v. Kansas City &c. R. Co., 56 Mo. App. 330; Covey v. Hannibal &c. R. Co., 86 Mo. 635; Berning v. Medart, 56 Mo. App. 448; Bohn v. Chicago &c. R. Co., 106 Mo. 429; Keegan v. Kavanaugh, 62 Mo. 230; Nolan v. Shickle, 3 Mo. App. 300; Aldridge v. Midland Blast Furnace Co., 78 Mo. 559; Moore v. St. Louis Wire Mill Co., 55 Mo. App. 491; Johnstone v. Oregon &c. R. Co. (Or.), 31 Pac. Rep. 283; Gulf &c. R. Co. v. Schwabbe, 1 Tex. Civ. App.

573; s. c. 21 S. W. Rep. 706; Anderson v. Winston, 31 Fed. Rep. 528; Hefferen v. Northern Pac. R. Co., 45 Minn. 471; United States Rolling Stock Co. v. Chadwick, 35 Ill. App. 474; English v. Chicago &c. R. Co., 24 Fed. Rep. 906; De Forrest v. Jewett, 23 Hun (N. Y.), 490; Foley v. Chicago &c. R. Co., 48 Mich. 622; s. c. 42 Am. Rep. 481; Coombs v. Fitchburg R. Co., 156 Mass. 200; s. c. 30 N. E. Rep. 1140; O'Neal v. Chicago, &c. R. Co., 132 Ind. 110; s. c. 31 N. E. Rep. 669; St. Louis, &c. R. Co. v. Lemon, 33 Tex. 143; s. c. 18 S. W. Rep. 331; Quick v. Minnesota Iron Co., 47 Minn. 361; s. c. 50 N. W. Rep. 344; Brady v. Ludlow Man. Co., 154 Mass. 468; Fisher v. Chicago &c. R. Co., 77 Mich. 548; Anglin v. Texas, &c. R. Co., 60 Fed. Rep. 553; Illinois River Paper Co. v. Albert, 49 Ill. App. 363; McGrath v. Texas &c. R. Co., 60 Fed. Rep. 555; Connors v. Morton, 160 Mass. 333; Goddard v. McIntosh, 161 Mass. 253; Roth v. Northern Pacific Lumber Co., 18 Or. 205; Southwest Virginia Improvement Co. v. Andrew, 86 Va. 270; s. c. 9 S. E. Rep. 1015; Lothrop v. Fitchburg R. Co., 150 Mass. 423; Smith v. Penintular Car Works, 60 Mich. 501; Fordyce Stafford, 57 Ark. 503; s. c. 22 S. W. Rep. 161.

he is hurt by it the case becomes a case for the application of the maxim *volenti non fit injuria*.<sup>1</sup>

A test frequently resorted to by the courts in these cases is to consider whether the servant *knew the danger as well as the master knew it*, or had as good opportunities of knowing it as the master had,—holding that there can be no recovery for an injury to the servant where these conditions exist.<sup>2</sup>

The nature and extent of this rule are better understood by considering some of the dangers and defects in respect of which the courts have applied it.

Take the case of *an unguarded well*, scuttle-hole, or shaft, descending from the floor of a manufacturing or business establishment. This, in many cases, must be regarded as a negligent defect in the premises, as a man-trap, a death-trap; and yet it has been adjudged again and again that an employé who works upon premises having such a hole takes the risk of falling into it through his own inadvertence.<sup>3</sup>

Take also the case of a laborer employed in and about an *excavation* in earth, sand or gravel. The danger of such an excavation caving in may be said to be nearly as obvious to one man as to another. Courts in several different jurisdictions have held that the risk of such an embankment caving in is an obvious risk, and one incident to the employment, which the employé takes when he consents to work in such a place.<sup>4</sup>

<sup>1</sup> Devitt v. Pacific Railroad, 50 Mo. 302, 306; Goltz v. Milwaukee &c. R. Co., 76 Wis. 186; s. c. 44 N. W. Rep. 752; Gorman v. Minneapolis &c. R. Co., 78 Iowa, 509; Watts v. Hart, 7 Wash. 178; s. c. 34 Pac. Rep. 423 and 771.

<sup>2</sup> Price v. Hannibal &c. R. Co., 77 Mo. 508; Porter v. Hannibal &c. R. Co., 71 Mo. 66; Hart v. Naumburg, 123 N. Y. 641; Ames v. Lake Shore &c. R. Co., 135 Ind. 363; Carlson v. Sioux Falls Water Co. (S. D.), 59 N. W. Rep. 217; Hazelhurst v. Brunswick Lumber Co., 94 Ga. 535; s. c. 19 S. E. Rep. 756; Galveston &c. R. Co. v. Lempe, 59 Tex. 19; French v. Aulls, 72 Hun

(N. Y.), 442; Cowhill v. Roberts, 71 Hun (N. Y.), 127; Southern Pacific R. Co. v. Losch (Tex. Civ. App.), 21 S. W. Rep. 563.

<sup>3</sup> Feeley v. Pearson Cordage Co., 161 Mass. 426; Murphy v. Greeley, 146 Mass. 196; s. c. 15 N. E. Rep. 654; Rick v. Cramp (Pa.), 12 Atl. Rep. 495; Schwartz v. Cornell, 13 N. Y. Supp. 355; Alford v. Metcalf, 74 Mich. 369; s. c. 42 N. W. Rep. 52; Balle v. Detroit Leather Co., 73 Mich. 158; s. c. 41 N. W. Rep. 216.

<sup>4</sup> Olson v. McMullen, 34 Minn. 94; Larich v. Moles, 18 R. I. 513; s. c. 28 Atl. Rep. 661; Vincennes Water Supply Co. v. White, 124 Ind. 376; s. c.

Take, for another example of the rule, the dangers which attend the work of *coupling cars*. This work is very dangerous, and the dangers attending it are increased where old-fashioned and imperfect couplings are used, and especially where the brakeman is required to couple cars having couplings of different patterns; and yet, in all these cases the risk being open and obvious, the brakeman is held in law to have assumed it and to take his chances of being able to escape injury from these causes.<sup>1</sup> In many of these cases the same rule was applied where the couplings were out of repair and defective for the kinds of couplings used.<sup>2</sup>

Take the case of *overhead railway bridges*, of railway bridges whose sides are built so near the track as to be dangerous to brakemen climbing up and down the sides of freight cars; and of other objects negligently and unnecessarily constructed or permitted to exist by the railway company so near its tracks as to endanger the lives of brakemen while so engaged in the discharge of their duties. Experience shows that these obstructions are murder-machines. It is not an exaggerated statement to say that the negligence which has erected them, or which permits them to exist, borders upon criminality. And yet there is a mass of judicial decisions, in this and in other courts,

24 N. E. Rep. 747; *Griffin v. Ohio &c. R. Co.*, 124 Ind. 326; *s. c.* 24 N. E. Rep. 888; *Anderson v. Winston*, 31 Fed. Rep. 528.

<sup>1</sup> *Thomas v. Missouri R. Co.*, 109 Mo. 187; *Kohn v. McNulta*, 147 U. S. 238; *Hathaway v. Michigan &c. R. Co.*, 51 Mich. 253; *Wabash &c. R. Co. v. Deardorff*, 14 Ill. App. 401; *Henry v. Bond*, 34 Fed. Rep. 101; *Barkboll v. Pa. R. R. Co. (Pa.)*, 13 Atl. Rep. 82; *Houston v. Burrager (Tex.)*, 14 S. W. Rep. 242; *Arnold v. Delaware &c. R. Co.*, 125 N. Y. 15; *s. c.* 25 N. E. Rep. 1064; *Atchison &c. R. Co. v. Wagner*, 33 Kan. 660; *Kelly v. Abbot*, 63 Wis. 307; *s. c.* 53 Am. Rep. 292; *Watson v. Houston &c. R. Co.*, 58 Tex. 434; *McLaran v. Williston*, 48 Minn. 299; *s. c.*

51 N. W. Rep. 387; *Pittsburg &c. R. Co. v. Henley*, 48 Ohio Stat. 608; *s. c.* 15 L. R. A. 384; *Brooks v. Northern &c. R. Co.*, 47 Fed. Rep. 687; *Simms v. South Carolina R. Co.*, 26 *s. c.* 490; *Michigan &c. R. Co. v. Smithson*, 45 Mich. 212; *Louisville &c. R. Co. v. Boland (Ala.)*, 18 L. R. A. 260; *Dysinger v. Cincinnati &c. R. Co.*, 93 Mich. 646; *s. c.* 53 N. W. Rep. 825.

<sup>2</sup> *Barkboll v. Pa. R. Co. (Pa.)*, 13 Atl. Rep. 82; *Houston &c. R. Co. v. Burrager (Tex.)*, 14 S. W. Rep. 242; *Arnold v. Delaware &c. R. Co.*, 125 N. Y. 15; *s. c.* 25 N. E. Rep. 1064; *Atchison &c. R. Co. v. Wagner*, 33 Kan. 660; *Brooks v. Northern &c. R. Co.*, 47 Fed. Rep. 687; *Watson v. Houston &c. R. Co.*, 58 Tex. 434.

to the effect that experienced train-men, who are familiar with the road and who consequently know or are presumed to know of these obstructions, take the risk of coming in contact with them through their own inadvertence, and if they are killed or hurt by them, there can be no recovery of damages.<sup>1</sup>

Take the case of *unblocked rails* in railway switches, in the frogs and between the main rail and the guard rail. This is a man-trap and a death-trap. The brakeman catches his foot in such a trap and, before he can extricate himself, he is run over by an approaching engine or by shunted cars. Yet this is an obvious risk which he assumes when he enters the service.<sup>2</sup>

Take, also, the case of the liability of the employé to death or injury from *exposed machinery*. In many cases the practice of employers of putting their employés at work around exposed and unguarded machinery, which could be fenced or guarded at a moderate expense, has attracted the attention of legislatures; and there are statutes forbidding this, under criminal sanctions, in England and in some of the United States; and yet American

<sup>1</sup> *Devitt v. Pacific Ry. Co.*, 50 Mo. 302 (overhead bridge); *Rains v. St. Louis &c. R. Co.*, 71 Mo. 184 (another overhead bridge case); *Williamson v. Newport &c. R. Co.*, 84 W. Va. 657; s. c. 12 L. R. A. 297; *Fitzgerald v. N. Y. &c. R. Co.*, 59 Hun (N. Y.), 226; *Brossman v. Lehigh Valley R. Co.*, 113 Pa. St. 490; s. c. 57 Am. Rep. 479; *Baltimore &c. R. Co. v. Stricker*, 51 Md. 47; *Lynch v. New York &c. R. Co.*, 18 N. Y. Supp. 417; *Ryan v. Long Island R. Co.*, 51 Hun (N. Y.), 607; *Williams v. Delaware &c. R. Co.*, 116 N. Y. 628; *Mo. Pac. R. Co. v. Somers*, 71 Tex. 700 (cattle-guard too near the track); *Dalton v. Atlantic &c. R. Co.*, 4 Hughes (U. S.), 180 (telegraph wire hanging too low over track); *Benston v. Chicago &c. R. Co.*, 47 Minn. 486 (pile of logs near track); *Clark v. St. Paul &c. R. Co.*, 28 Minn. 128 (elevator roof or awning projecting over side-track); *Wooddell v. West Virginia Imp. Co.*, 88 W. Va. 23; s. c.

17 S. E. Rep. 386 (tree limb projecting over track); *Thain v. Old Colony R. Co.*, 161 Mass. 363 (wooden bridge support too near track); *Fitsch v. Ry. Co.*, 158 Mass. 238 (projecting awning at a station); *Dowell v. Burlington &c. R. Co.*, 63 Iowa, 629 (snow-bank left on side of track by snow plough).

<sup>2</sup> *Smith v. St. Louis R. Co.*, 69 Mo. 32; *Wood v. Locke*, 147 Mass. 604; *Haws v. Buffalo &c. R. Co.*, 40 Hun (N. Y.), 145; *St. Louis &c. R. Co. v. Davis*, 54 Ark. 389; s. c. 15 S. W. Rep. 895; *Richmond &c. R. Co. v. Risdon's Adm.*, 87 Va. 335; s. c. 12 S. E. Rep. 786; *Appel v. Buffalo &c. R. Co.*, 111 New York, 550; *Wilson v. Winona &c. R. Co.*, 37 Minn. 326; *Bourgeault v. Grand Trunk R. Co.*, *Montreal L. Rep.*, 5 Super. Ct. 240; *Craig v. Lake Erie &c. R. Co.*, 1 Toledo Leg. News, 326; *Gleason v. New York &c. R. Co.*, 159 Mass. 68; s. c. 34 N. E. Rep. 79; *Spencer v. New York &c. R. Co.*, 67 Hun (N. Y.), 196.

judicial authority seems to be nearly unanimous to the effect that the servant, whether he be an adult or a minor, male or female, if sufficiently old and experienced to realize the danger of getting caught in such machinery, takes the risk of death or injury from that source, and in case of such a death or injury there can be no recovery of damages.<sup>1</sup>

Several of the foregoing cases hold that the rule that a servant, who voluntarily goes to work about dangerous machinery, accepts the risk of death or injury from that source, so that no action can be predicated upon his death or injury, *applies to minors as well as to adults* except in the case of concealed dangers or other exceptional circumstances which need not be gone into. This doctrine is distinctly set forth in many other cases.<sup>2</sup>

Indeed the law seems to be settled, subject to some objections of which I hope to speak in a future article, that the fact that an employé is a minor does not vary the law, as to his assumption of the risks of the service, if he has sufficient intelligence to comprehend the dangers incident to the service, or if he is made acquainted with those dangers by being suitably instructed, or if he has acquired a knowledge of them through experience.<sup>3</sup>

<sup>1</sup> *Cirlack v. Merchants' Woolen Co.*, 146 Mass. 182; *s. c.* 15 N. E. Rep. 579; *Craver v. Christian*, 36 Minn. 488; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261; *s. c.* 15 N. E. Rep. 576; *Pratt v. Prouty*, 153 Mass. 838; *s. c.* 26 N. E. Rep. 1002 (boy 15 years old); *Tinkham v. Sawyer*, 153 Mass. 485; *s. c.* 27 N. E. Rep. 6 (boy 16 years old); *Atlas Engine Works v. Randall*, 100 Ind. 298; *Bond v. Smith*, 14 N. Y. Supp. 982; *Plunkett v. Donovan*, 12 N. Y. Supp. 454; *Schroeder v. Michigan Car Co.*, 56 Mich. 182; *Stephenson v. Duncan*, 78 Wis. 404; *Foley v. Pettie Machine Works*, 140 Mass. 294; *s. c.* 21 N. E. Rep. 304; *Cluny v. Cornell Mills*, 160 Mass. 218; *Downey v. Sawyer*, 157 Mass. 418 (boy 16 years old); *Kelley v. Barber Asphalt Co.*, 93 Ky. 868; *s. c.* 20 S. W. Rep. 271 (boy 17 years old); *Richstain*

*v. Washington Mills Co.*, 157 Mass. 538; *Kleinest v. Kunhardt*, 160 Mass. 230; *Connelly v. Eldridge*, 160 Mass. 566; *Townsend v. Langles*, 41 Fed. Rep. 919; *The Maharajah*, 40 Fed. Rep. 784; *Roth v. Northern Pacific Lumber Co.*, 18 Or. 205; *s. c.* 23 Pac. Rep. 842; *Sanborn v. Atchison & R. Co.*, 25 Kan. 292 (boy 17 years old); *Kelly v. Silver Spring & Co.*, 12 R. I. 112; *Rood v. Lawrence Mfg. Co.*, 155 Mass. 590; *s. c.* 34 N. E. Rep. 458.

<sup>2</sup> *Hickey v. Taaffe*, 105 N. Y. 26; *Gilbert v. Guild*, 144 Mass. 601; *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329; *O'Keefe v. Thorne (Pa.)*, 16 Atl. Rep. 737; *Palmer v. Harrison*, 57 Mich. 182; *Malsky v. Schumacher*, 27 N. Y. Supp. 381; *Crown v. Orr*, 140 N. Y. 450; *Stephen v. Stevens*, 21 N. Y. Supp. 721.

<sup>3</sup> *Goff v. Norfolk & C. R. Co.*, 36 Fed.

The conclusion would seem to be that in those States where this doctrine is administered by the courts, the subject demands the earnest attention of the legislature; and that employers' liability acts ought to be passed, carefully drawn and guarded, so as to evade judicial misconstruction, and so as to define on the one hand the extent of the duty of the master in taking care for the safety of the servant, and on the other hand, the extent to which the servant shall be deemed to accept the dangers of his employment.

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Rep. 299; Buckley v. Gutta Percha Co., 113 N. Y. 540; Toledo &c. R. Co. v. Trimble (Ind. App.), 35 N. E. Rep. 716; Hefferen v. Northern Pacific R. Co., 45 Minn. 471; McGinnis v. Southern Canadian Bridge Co., 49 Mich. 466; Smith v. Irwin, 51 N. J. L. 507; Williamson v. Sheldon Marble Co., 66 Vt. 427; s. c. 29 Atl. Rep. 669; Evans v. Vogt &c. Co., 25 N. Y. Supp. 509; Evansville &c. R. Co. v. Henderson, 134 Ind. 636; s. c. 33 N. E. Rep. 1021.

## WHY ARE THE DECISIONS UNDER THE FELLOW-SERVANT DOCTRINE SO VACILLATING AND CONTRADICTION?

That there is great conflict and confusion in the decisions as to a master's liability to one servant for injuries received by the negligence of a co-servant is common knowledge among lawyers. Not only do we find want of harmony between the decisions of the different States on this subject, but the decisions of the same court are frequently, if not generally, vacillating and contradictory. We find, for instance, that a servant injured in the State of Iowa<sup>1</sup> may recover damages against the employer, while a servant injured in Minnesota<sup>2</sup> under similar circumstances will be denied the right of recovery. The above cases were tried by the same court on substantially identical facts; the statute imposing liability for the negligence of a fellow-servant was the same in the two States, and yet one servant recovered damages while the other servant was not allowed to recover. The place where the servant was injured and not the manner in which the injury was inflicted determined the question of liability or non-liability of the master. A State court denied<sup>3</sup> and a Federal court affirmed<sup>4</sup> liability in the same case. These same courts later have apparently exchanged positions on this question, the State court<sup>5</sup> becoming more liberal toward the servant, while the Federal court<sup>6</sup> has adopted a stricter rule against the servant's right to damages for injuries received at the hands of a co-employé.

The State of Ohio has adopted the so-called superior servant

<sup>1</sup> *Njus v. C. M. & St. P. R. R.*, 47 Minn. 92.

<sup>2</sup> *Pearson v. C. M. & St. P. R. R.*, 47 Minn. 9.

<sup>3</sup> *Lindvall v. Wood*, 41 Minn. 212.

<sup>4</sup> *Lindvall v. Wood*, 44 Fed. R. 855; aff. in 48 Fed. 62.

<sup>5</sup> *Carlson v. N. W. Telephone Exch.*, 65 N. W. 914; *Bloomquist v. Ry.*, 62 N. W. 818.

<sup>6</sup> *What Cheer Coal Co. v. Johnson*, 56 Fed. R. 810; *City of Minneapolis v. Lundeen*, 58 Fed. R. 525.



limitation.<sup>1</sup> This, for a while, was the rule of the Supreme Court of the United States.<sup>2</sup> To a certain extent, at least, the Ross case has been abandoned by the Federal Supreme Court,<sup>3</sup> and by the other Federal courts. The result is, that in States having adopted the rule prevailing in Ohio, whether a servant may recover or not, depends wholly upon whether he brings his suit in the State or in the Federal court. As we have already seen, the highest court in the land is not settled on this question. No one can predict with any degree of certainty just what the court may hold when this question is again presented to it for consideration. Is there anything left of the Ross case,— what effect has it on the Ross case,— are questions frequently asked by students of the somewhat famous Baugh case. To add to the confusion several States of the Union have passed laws permitting servants of railroad companies to recover for injuries received because of negligence of co-employés. These laws have been assailed as class legislation. They have, however, been sustained so far as they apply only to the *peculiar hazards and dangers of railroading*.<sup>4</sup> A difficult question at once arises. What cases are within and what cases are outside the statute? What are the peculiar hazards and dangers of railroading? To this question we might expect conflicting answers, and in this expectation we are not disappointed.<sup>5</sup>

In view of the many different reasons assigned for the fellow-servant doctrine, the many limitations, exceptions and qualifications imposed upon the general rule, the many conflicting and contradictory decisions, a person naturally would inquire what is the cause, the real reason for this uncertainty and this conflict. If the fellow-servant doctrine were based upon sufficient and satisfactory reasons, it would seem that no such conflict and confusion would exist. The original and primary rule, of course, was that a man should be responsible only for his *own acts* and not for the acts of another. The doctrine *respondeat superior*,

<sup>1</sup> Little Miami R. R. v. Stevens, 20 Ohio, 415.

<sup>2</sup> C. M. & St. P. R. R. v. Ross, 112 U. S. 377.

<sup>3</sup> Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368.

<sup>4</sup> Lavalle v. R. R., 40 Minn. 249.

<sup>5</sup> Njus v. R. R., 47 Minn. 92; Pearson v. R. R., 47 Minn. 9; Johnson v. R. R., 43 Minn. 222; Mikkelsen v. Truesdale, 65 N. W. 260; Blomquist v. R. R. 67 N. W. 804.

which is crystallized in the maxim *qui facit per alium per se*, is an exception to this fundamental and original principle. It may be doubted whether the doctrine *respondeat superior* in its broad and unlimited application, is grounded upon true and logical reasons. Has the doctrine *respondeat superior* not been extended far beyond the limit of reason? To the extent that a man contracts to perform a certain duty, he is bound to see the duty performed. It then makes no difference whether he performs that duty personally or by his employé. In such cases, the doctrine *respondeat superior* is clearly just and equitable. If a carrier agrees to carry a passenger safely, and if the carrier chooses to perform that duty by his servant, it is clear that in the event of the servant's failure or neglect to perform this duty, the master is liable in damages. If a telegraph company agrees to deliver a message, and if it fails to do so through the neglect of its servants to whom it has seen fit to entrust the duty, of course the telegraph company is justly liable for its servant's failure under the doctrine *respondeat superior*. On the other hand, if a master has entered into no contract and has himself been guilty of no neglect either in the employment of his servant or otherwise, and if, by the neglect of the servant, a stranger to the master is injured, it may well be doubted whether there is any true and just reason for holding the master responsible for the servant's neglect. If a liveryman has exercised all possible caution in the employment of his servant, if he has investigated the prior character of his servant and found him prudent and careful, why should the liveryman be held liable to a wayfarer on the street for injuries received by some oversight of the servant while driving the liveryman's vehicle? What true and just reason can be given for holding the liveryman liable for damages for the injuries thus sustained? A great many reasons have been assigned for the application of the rule *respondeat superior* in such cases. Some courts and some text-writers say that the doctrine is founded upon public policy. When a physician is unable to tell what is the matter with his patient, if he does not know what the patient died of, he generally says that he died of blood poisoning or heart failure. If a court is unable to give a good and sufficient reason for the rule

it announces, it generally resorts to a similar waste basket explanation or reason and says that public policy demands the rule. "Public policy justifies it" sounds well and may satisfy some minds, but it is difficult to see how any question of public policy arises in a controversy between a third person, a stranger, who has been injured by the negligence of a servant, and a master who is absolutely free from blame in the premises. Why does not public policy as well require a master to see to it that the servant pays his board bill? We hear it said that the master should answer for the servant's negligence because he has put the means in the servant's hands wherewith to do injury. So the master does when he employs an independent contractor. Under that reason the master should not be exempted where injury is done by an independent contractor. The alarming consequences, and we may almost say the absurdity of the unlimited and general application of the doctrine *respondeat superior* is probably the cause of the numerous exceptions and limitations to which the rule has been subjected and among which<sup>1</sup> we find the doctrine that a master shall not be liable to a servant for injuries received by the neglect of a co-servant.

Hon. Sir Wm. Brett, afterwards Judge Brett,<sup>2</sup> in the House of Commons of the English Parliament, says in regard to the fellow-servant rule, "This is a bad exception to a bad law."<sup>3</sup>

<sup>1</sup> Baron Bramwell says that the fellow-servant doctrine is not an exception but simply a reversal to the primary rule. He says: "It is somehow supposed that as a matter of natural right, something that exists in the nature of things, employers are liable for the injuries occasioned by their servants' negligence, and that to except fellow-servants from this rule is unjust and unreasonable. Now, this is an entire mistake, and it is really wonderful how not only those who are not lawyers, but lawyers who ought to know better, are under the impression that I have mentioned. It becomes necessary to begin at the beginning and state some entirely ele-

mentary rules of law. The primary rule is, that a man is liable for his own acts, and not for those of others. A man, as a rule, is no more liable for the wrongs done by another than he is for his debts. The cases in which he is liable are exceptions to the rule, and not the rule."

<sup>2</sup> Brett, as Master of Rolls, rendered the opinion in the famous case of *Heaven v. Pender*, 9 Q. B. D. 302. That decision shows him to be a man of strong and clear reasoning powers, and his views on the fellow-servant law are entitled to a great deal of weight.

<sup>3</sup> House of Commons English Parliament Document 285, page 118.

If a total stranger can recover against a master for injuries inflicted by a servant, why cannot a servant also recover for similar injuries at the hands of the same servant? It is rather difficult to see why a servant is not entitled to at least as much consideration as a total stranger.

How did this exception to the doctrine *respondeat superior* in the case of fellow-servants arise? Possibly the great number of actions brought by servants against the master led the courts to perceive the injustice of the doctrine *respondeat superior* where the master was wholly free from blame, and for that reason adopted the exception as to the suit brought by the servant. Several reasons have been advanced for this exception against the servant, and in favor of the stranger. It is doubtful whether these reasons are satisfactory and sufficient. It is said that a servant knows whether or not his fellow-servant is habitually negligent. In a great majority of cases this is not true. Servants of the same master are very frequently employed at great distances apart in *really* different lines of employment, and yet under the fellow-servant rule, the servant assumes the negligence of his co-servant. It is said that a servant gets an increased compensation as a consideration for the assumption of the risk of the negligence of a co-employé. This is simply a fiction and has no foundation in fact and is not a reason for the rule. Unless there is some good and valid reason for holding the master responsible for the negligence of a servant where the master is wholly free from moral blame and where he is under no contract obligation, why make the master the subject of vicarious liability in favor of a third person any more than in favor of a fellow-servant? The *respondeat superior* doctrine was apparently adopted without much thought or consideration from the Roman law.<sup>1</sup> Under the Roman law the *pater familias* was the only party who could be sued. He was the head of the family. All his servants were slaves. Why should the Roman law have any application in a community where the servant is an independent and free being? A servant is no longer a tool or instrument in the hands of

<sup>1</sup> 2 Kent Comm., 12th Ed., note 1.

a master, but a free and independent being who should answer for his own wrongs. Why extend the servant law far beyond the limits it originally possessed under the civil law? Why should the wrongful acts of the servant be imposed upon an innocent person (the master) unless the master has contracted to assume them or is in some way to blame? Why is not Judge Brett right when he said the fellow-servant law is a bad exception to a bad law? Does this statement not suggest the proper answer to the question put at the head of this article? Is the difficulty of the fellow-servant law not due to the fact that it is a bad exception to a bad law? Is not the confusion and conflict in the decisions on that subject due to the fact that the rule is not and cannot be founded on logical reasons which satisfy the minds of courts and lawyers? We venture the suggestion that to this last question we must make an affirmative answer.

N. M. THYGESON.

ST. PAUL.

## THE LAW AS A PROFESSION FOR YOUNG MEN.

Just at the present time the contraction in business and diminished salaries paid in many callings have caused young men to look eagerly to the professions for their life's work.

The fact that only a moderate, if any, capital is required by the attorney, and the fact that large fees are from time to time extensively published as having been received by successful advocates, operate to draw young men of ambition and energy to the law.

Speaking generally, the average income of attorneys is above that received in other vocations. The large rewards, however, which are so diligently followed and anxiously awaited are, after all, but exceptions. The road to success anywhere, and especially in the law, is a steep and narrow path which must be industriously pursued with no assurance that the return will meet the expectations of those who follow it.

The young man who would succeed in the profession must be equipped first, with application; second, with ability; and third, with a real aptitude and inclination for the law. Genius will make its mark and succeed anywhere, but I would rank as the next greatest qualification, industry. Success will be obtained by carefully applied energy, and with a moderate amount of ability, rather than with the larger qualities of the mind and lesser perseverance. Even with ability and energy, one's calling may be and is mistaken, unless the trend and bent of the mind be such as to qualify the aspirant for the pursuit of the law.

When I attended school, it used to be understood among us that aptitude for declamation was the chief qualification of the lawyer. But I would state that it is not *how* one declaims, but *what* he declaims which indicates the true abilities of the mind. Therefore, mere eloquence is not to be so greatly desired by the young attorney.

Modern juries and judges presiding at trials are but little influenced by mere oratory, as such. The time for metaphor and vehemence of gesture, while proper in their place, has passed away, and solidity of thought and force of reasoning must inevitably prevail over the mere adornments of speech.

I would caution all young men, therefore, before choosing the law as a profession, to study their own inclinations and not to glance superficially over the field. They should in addition seek the careful advice of friends who are attorneys, and who can give practical suggestions in individual cases as to the aptitude of the applicant for the pursuit of the law under all the circumstances. General rules must always be modified and controlled by the conditions prevailing in particular cases.

The student of the law should have a sincere love of the profession which he has chosen for his life's work. There will be many years of toil and of disappointment and of fatigue. The competition for honors and for success is keen, and is increasing almost daily. There should, therefore, be no half-heartedness; for it is known that large numbers of those who qualify themselves for the law do not ultimately follow it as a means of livelihood.

The student at the bar should be endowed not only with mental, but with physical energy. No man of weak health ought to be advised to enter the profession. Its pursuit involves long hours of close confinement. The daily practitioner soon begins to grow old under the strain. Few of our leading attorneys continue actively engaged as such into advancing years. Instances of success at the bar or of great usefulness on the bench, on the part of men of weak physique, are but few.

Again, the mere legal or technical mind, while greatly to be desired, is not the highest qualification of the attorney. I place before it the sensible, practical mind. A proper amount of technical knowledge and good sense gives the best results. So much depends not only upon strategy in law, but also upon correct judgment under varying circumstances, that I would give the higher claims to common sense rather than to mere legal sense. Comparatively few cases are won upon what are known as legal technicalities. The books and papers teem with references to

them, but the vast majority of actions are decided on their merits.

If to common sense and clear-headedness there is added competent legal knowledge, then indeed the proper basis for success is established.

The ordinary lawyer, however, who succeeds in his litigation is generally only moderately endowed with these qualifications, and his success comes not so much from what he does, or what he says, but as to what is its effect, or what is the impression of his individuality upon his fellow-men.

Then there must indeed be on the part of the student the ability to wait. The early years furnish little or no reward. In fact, the greatest struggle comes within the first five years, when the youth is either a student or beginning his career in the profession. These are the discouraging times, not so much when one is just beginning, but after he has awaited his opportunity, not merely to make his fortune, but to show his abilities. Even when the opportunity has presented itself, and it has been fully grasped, still the reward is small, and the reputation gained, while commended by personal friends, is often remarkably inadequate in its practical results.

Many young men are obliged to support themselves, during their early years at the bar, by pursuing indirectly other vocations; but this is a matter which must address itself to the circumstances of each aspirant.

The possession of industry, good health, and common sense insures to the student of the law more than ordinary success in this life. There must, however, in these early years be but little thought of the pursuit of pleasure. Force and decision of character are then in process of formation, and the solidity of the personality is being established. From all this, there becomes a part of the man that individuality which has its unconscious effect over those with whom he comes in contact. This is the subtle underlined influence which determines the litigant in the choice of his counselor and advocate.

One of the incidents of the profession is the fact that lawyers lead by their business a semi-public life. The press contains much regarding trials and the sayings and doings of attorneys.



They become, in a measure, more or less widely known. This, therefore, is supposed, in a large part, to be a qualification for political life. Many assume that the law and politics go hand in hand. I take it that the law is not so much a stepping-stone into public life as is the fact that the training of the lawyer necessarily qualifies him to consider broadly questions from every standpoint. The practice of the profession operates towards expansion rather than towards contraction of view. Its influence is broadening and enlarging. The tendency of the attorney is, in fact, to become generous and liberal-minded. The pursuit of politics is not, however, in cities at least, of any assistance to the attorney, as such. It is rather a distinct detriment.

Political success seldom brings desirable clients, and this should be thoroughly understood by the legal student. In the early years, however, politics may with propriety be cultivated merely as an introduction to the public and as a means of enlarging acquaintance.

To prepare for the law nothing is more requisite than a careful preliminary education, extending, if possible, through the University. As to the latter, however, success is often obtained without it. Too many young men are anxious to economize the three or four years passed in a higher collegiate course. This, however, unless a matter of strict necessity, is a mistake. Nothing so qualifies the mind for subtlety of argument, and for strength of mind in debate, as the training given in the involved higher academic studies.

As to the location for business, each student generally finds himself more prepared to begin near home, rather than in some remoter neighborhood. Generally speaking, suburban cities have many of the disadvantages without the corresponding benefits of a metropolis. A foothold can be more easily secured in a smaller than in a larger place. A reputation in the law is there established with less effort and time; but the rewards are in the end more meager than in the city. The latter is the region of large opportunity; but it is the place also of relative discouragement. The contest goes on there for all time. The labors and the chances are great, but the reward, when once obtained, is proportionately greater.

I well remember in my youth reading of how Daniel Webster pleaded his first cause. His ability and eloquence won him success, and, as he passed out of the court room, briefs were handed him by suitors anxious to engage him as their counsel. From that time on, his success was assured. The American youth may have that or a similar picture in his mind. To-day the able attorney commencing his career makes his effort in court, and is rewarded by victory. But the times have changed. Outside, the great whirl and rush of human affairs goes on unceasingly. No expectant client stands at the court room door awaiting the exit of the successful advocate. The press has a kindly notice; friends give their congratulations. It is only an incident, however. A successful act has merely passed into the space of eternity.

Then comes discouragement, the waiting and the working for years, and only slowly, almost imperceptibly, reputation and position in the profession are gained. All this must be thoroughly understood by the student. Success at the bar should, however, not be anticipated alone. The chance of failure should itself be fully considered as well. It is said that everything comes to him who waits, and that there is always room on the top. These after all are only sayings. Sometimes, if not oftentimes, success does not come even to him who both waits and works.

The elements of success are subtle, mysterious and often difficult to understand. How to reach the top will be the problem not only for to-day but for all time. The law is fascinating to the true student and advocate. Its returns are great, but their attainment is not a matter of abstract calculation. And then, too, let me urge that the mere attainment of the top, for its own sake, must inevitably be a disappointment. Happiness does not come from mere position, nor does contentment flow from station.

I would close this subject by saying that the great problems of this world may not be determined by one person for another. Each must strive onward and upward, impelled by his own inclinations, assisted by uprightness and supported by a sincerity of purpose, which, after all, must give not only the material, but also the higher rewards of life.

F. S. STRATTON.

SAN FRANCISCO, CALIFORNIA.

## ADVICE ABOUT THE ADJUSTMENT OF FIRE LOSSES.

Every adjuster is, by the very nature of his business, more or less biased in favor of his company, the reason that being he is paid by it to look out for its interests. He has adjusted so many fraudulent losses, some of which were fraudulent in their origin, and some, while of honest origin, yet the claim of loss was fraudulent, and his company had to pay a great deal more than the loss really amounted to. He has paid for rebuilding brick walls when the walls were not even repaired so much as to give them a fresh coat of plaster or paint; and in some cases, and they are not so infrequent either, he has paid a second time for that selfsame wall; and a second time he has observed his company's money go into the pocket of the insured without one cent of it going to enrich labor for repairing that wall. He has paid \$3,500 to a clerk whose salary did not exceed \$100 per month, for the furniture in a four-room flat, when the owner of that furniture could not remember from what store a single piece was purchased, or how he had come into possession of it, neither could his wife. He has been asked to pay for twelve bottles of benedictine in a barrel-house saloon on Wash street, when no first-class saloon in the city keeps more than two bottles in stock. He has time and again been informed he must pay a damage by smoke to wines and whisky in air-tight barrels and bottles; and, while he knows that no damage has resulted, yet in some instances he has had to pay such claims. He has been compelled, when a trunk or closet burned, to pay for sealskin sacques and Parisian made silk dresses, which never existed except in the imagination of the fertile brain of the person who owned the fire policy, which instrument of writing, wonderful to relate, is never destroyed in such cases; and such losses are not as scarce as the proverbial hen's teeth.

When you have sustained a loss you had best get some well-posted adjuster to help you make the settlement, and thus guard

against any mistakes you may make, and see that your interests are protected, and at the same time avoid antagonizing the company's adjusters, remembering the old saying, "You can catch more flies with molasses than with vinegar." But do not employ anyone unless you know he understands his business. There are any number of agents who have been in the insurance business for years who know no more about adjusting losses than does the average business man; and lawyers know less. I am speaking now, not of any legal complications, but of adjustments pure and simple. The company employs an expert adjuster to settle with you. Why shouldn't you employ one? Your loss may be ever so honest, but if the adjuster happens to size it up in a different light, he may not tell you so, for the reason he cannot prove it; but he will apply the knife in cutting your claim down at every opportunity. Remember he is not in your employ.

The necessary steps to comply with the requirements of the policy in case of loss cannot be more clearly or concisely stated than by quoting the conditions of an ordinary policy bearing on the subject. They are:—

1. If fire occur, the insured shall give immediate notice of any loss thereby, in writing, to the company. Compliance with this requirement is a condition precedent to recovery.<sup>1</sup> Notice fourteen days after fire is too late.<sup>2</sup> Accident or misfortune happening to party bound to perform this condition will not excuse performance.<sup>3</sup>

2. The insured should protect the property from further damage, forthwith separate the damaged and undamaged property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article, and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, should render a statement to the company, signed and sworn to by said

<sup>1</sup> *Ins. Co. v. Kyle*, 11 Mo. 278; *Ins. Co. v. McGooky*, 33 Ohio St. 555; *Inman v. Ins. Co.* (N. Y. S. C.), 12 Wend. 452; *Cashau v. Ins. Co.* (U. S. S. C.), 5 Biss. 476; *Phillips v. Ins. Co.*, 14 Mo. App. 220.

<sup>2</sup> *La Force v. Ins. Co.*, 43 Mo. App. 518.

<sup>3</sup> *Sherwood v. Ins. Co.*, 73 N. Y. 447.

insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and should furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and should also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured), living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify. I am drawing these statements as to time and manner of making proofs of loss from the language of a particular policy. Other policies may vary these particulars somewhat; but nearly all policies in present use in the United States are substantially alike in this regard.

Full compliance with the foregoing requirements, *i. e.*, the furnishing of proof of loss in the manner and in the time specified in the policy, is condition precedent to recovery.<sup>1</sup>

A certificate of the nearest notary public must be had, when that is called for by the terms of the policy.<sup>2</sup>

3. Many policies require that the insured, as often as required, shall exhibit to any person designated by the company all that remains of any property therein described, and submit to examinations under oath by any person named by the company, and subscribe the same. This condition is valid and will be enforced.<sup>3</sup>

<sup>1</sup> *Ins. Co. v. Hathaway*, 48 Kan. 399; *Ins. Co. v. Seyferth*, 29 Ill. App. 513; *Leigh v. Ins. Co.*, 37 Mo. App. 542; *Lee v. Ins. Co.*, 73 Tex. 641; *Blossoms v. Ins. Co.*, 64 N. Y. 162; *Ins. Co. v. Kyle*, 11 Mo. 278.

<sup>2</sup> *Noonan v. Ins. Co.*, 21 Mo. 81; *Leigh v. Ins. Co.*, 37 Mo. App. 542.

<sup>3</sup> *Gross v. Ins. Co.*, 22 Fed. Rep. 74; *Grigsby v. Ins. Co.*, 40 Mo. App. 276; *Bonner v. Ins. Co.*, 13 Wis. 677.

The insured may have his attorney present during such examination.<sup>1</sup>

4. Many policies provide that the insured, as often as required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by the company or its representative, and shall permit extracts and copies thereof to be made. Refusal to comply with this condition will defeat the claim.<sup>2</sup>

In a very few instances you may run across a policy which requires proofs of loss to be made in thirty days, in which case it is binding and valid; but in nearly every instance the policies now in use require proofs to be in the office of the company within sixty days after the fire.

5. Many policies provide that, in the event of disagreement as to the amount of loss, the same shall be ascertained by two competent and disinterested appraisers, the insured and company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; the award in writing of any two shall determine the amount of such loss; and the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire.

A refusal to enter into an appraisal, in compliance with the foregoing condition, will forfeit the policy. Award of appraisers is binding on both parties.<sup>3</sup>

When a disagreement has arisen, the assured must demand an appraisal.<sup>4</sup>

<sup>1</sup> Thomas v. Ins. Co., 47 Mo. App. 169; Grigsby v. Ins. Co., 40 Mo. App. 276.

<sup>2</sup> Phillips v. Ins. Co., 14 Mo. 220; Hammond v. Ins. Co., 26 N. B. 371; Murphy v. Ins. Co., 62 Mo. App. 495.

<sup>3</sup> Ins. Co. v. Lewis et al. (Fla. S. C.), 21 Ins. Law J. 816; Mosness v. Ins. Co. (Minn. S. C.), 52 N. W. Rep.

982; Ins. Co. v. Gilmour (Scott. Ct. of Sessions), 30 Scot. Law Rep. 172; Hamilton's Ex'rs v. Ins. Co. (Cincin. Sup'rior Ct.), 29 Weekly Law Bul. 209; Kahnweiler v. Ins. Co. (U. S. C. C.), 57 Fed. Rep. 562.

<sup>4</sup> Ins. Co. v. Hamilton (U. S. C. C. A.), 59 Fed. Rep. 258; Murphy v. Ins. Co., 62 Mo. App. 495.

If an attempt is made to avoid an award on the ground of partiality, conspiracy, or fraud on the part of the appraisers, every presumption must be made in favor of fairness, and it should not be set aside except upon clear and strong proof.<sup>1</sup>

Under many policies, the loss becomes due and payable sixty days after due notice, ascertainment, estimate by the company and the assured or by appraisers, and satisfactory proof of the loss have been received by the company in accordance with conditions named.

A denial of liability by the insurer waives proofs of loss and all other requirements of the policy, and you may instantly bring suit to enforce payment.<sup>2</sup>

When you have complied with these requirements, and the insurer does not within sixty days after such compliance on your part, or other time limited by the policy, pay your loss, then your claim is in good shape for a lawyer to enforce payment in court, and not until then; for suit cannot be brought until the sixty days have elapsed, reckoning the time from the date of the receipt by the company of the proofs of loss. And when you do get a lawyer, get a good one. A cheap lawyer may save you something in fees charged, but will cost you something in the way of court costs and time, and may lose your case, in that he may overlook some technical point in his petition, or in the manner of conducting the trial of the case.

A law should be passed giving every large city a fire marshal

<sup>1</sup> *Mosness v. Ins. Co.* (Minn. S. C.), 52 N. W. Rep. 932.

<sup>2</sup> *May on Ins.*, Sec., 488; *Ins. Co. v. Richardson* (Neb. S. C.), 58 N. W. Rep. 597; *Ins. Co. v. Fallon* (Neb. S. C.), 24 *Ins. Law Jl.* 690; *Ins. Co. v. Journal Pub. Co.* (Wash. S. C.), 20 *Ins. Law Jl.* 395; *Ins. Co. v. Maguire*, 57 *Ill.* 342, and cases there cited; *Ins. Co. v. Carey* (Ill. S. C.), 6 *Ins. Law Jl.* 498; *Cobb v. Ins. Co.*, 11 *Kan.* 93; *Ins. Co. v. Gracey* (Cal. S. C.), 20 *Ins. Law Jl.* 28; *Ins. Co. v. Weeks* (Kan. S. C.), 26 *Pacific Reporter*, 410; *Hale and another v. Jones*, 48 *Vt.* 227; *Donahue*

*v. Ins. Co.* (Vt. S. C.), 13 *Ins. L. J.* 116. Connecticut Supreme Court decisions are in line with these. There are some few decisions to the effect that denial of liability does not waive the sixty day time for payment, but the only ones I can find are Iowa decisions, namely: *McConnell v. Ins. Co.* (Iowa S. C.), 19 *Ins. Law Jl.* 817; *Ellis v. Ins. Co.*, 64 *Iowa*, 507; *Miller v. Ins. Co.*, 70 *Iowa*, 704; *Eggleston v. Ins. Co.*, 68 *Iowa*, 308; *Quinn v. Ins. Co.*, 71 *Iowa*, 615. The weight of authorities seems to be against the Iowa decisions.

whose duties should be to hold a fire inquest on all fires for the purpose of ascertaining the origin of the same, and rendering an award in accordance with the evidence. And in country districts this duty should devolve upon the justice of the peace in whose bailiwick the loss occurs. Fires would then grow less, and competition for business would lower the rates and compel prompt settlement of losses.

THRASHER HALL.

ST. LOUIS, MO.



## NOTES.

**THE AMERICAN BAR ASSOCIATION.**—The next meeting of this learned and influential body will be at Cleveland, O., in August next. So much interest attaches to its meetings that we renew the suggestion that the feasibility of holding two meetings a year be considered: one to be held somewhere in the summer cool of the North, and the other somewhere in the winter warmth of the South. A winter meeting at Jacksonville, Atlanta, New Orleans, or Galveston, and an occasional migratory meeting on the Pacific Coast would make the American Bar Association more nearly a national body, and less an Eastern body, than it now is.

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**LAWYERS IN THE NEXT CABINET.**—A subscriber calls our attention to the fact that, in our note on this subject in our last issue,<sup>1</sup> we erroneously stated that Hon. Nathan Frank was one of the vice-presidents of the Missouri delegation in the convention which nominated Mr. McKinley; whereas, he was one of the vice-presidents of the convention. Our mistake was a natural one: It grew out of the fact that Mr. Frank kept his place with his State delegation, on the floor of the convention, where he could best advance the candidacy of Mr. McKinley, instead of taking his seat on the platform, as he was entitled to do.

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**COLLISIONS AT SEA — NEW INTERNATIONAL RULES.**—It is understood that the international rules to prevent collisions at sea, prepared at Washington by the delegates to the International Marine Conference of 1889, may go into effect on the 1st of next July (1897). These rules were to have gone into effect on March 1, 1895, but owing to the refusal of Great Britain to give her consent, their promulgation was postponed.<sup>2</sup> Since then Great Britain has agreed to the rules, and is now co-operating with the United States in securing the assents of the few remaining nations which have not yet accepted the new rules. The following nations

<sup>1</sup> 30 Am. Law Rev. 893.

<sup>2</sup> See Am. Law Review, Vol. 30, pp. 296-7.

have agreed to adopt the rules and enforce them after July 1st: Great Britain, United States, Germany, France, Denmark, Russia, Italy, Portugal, Austria, Belgium, Spain, Hawaii, Japan, Mexico, Guatemala, Chile, Honduras. These nations, it is said, control 22,000,000 tons of shipping, or more than five-sixths of the world's shipping. The important nations, whose consent has not yet been received, are: Norway, Sweden, the Netherlands, Brazil, and Turkey, controlling about 3,000,000 tons of shipping. This will be an important step in the commercial arena and will mark an epoch in the history of the maritime relations of the world. The great salutary result will be, that it will tend to lessen collisions at sea and consequent loss of life and property, by having uniform rules of navigation all over the world. These new rules are published in full in Vol. I, Supplement to Revised Statutes of the United States, pages 781-789.

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**POWER OF CORPORATIONS TO PREFER THEIR CREDITORS.**—The St. Louis Bar Association are promoting, in the legislature of Missouri, an act prohibiting private corporations from preferring their creditors in the event of their insolvency. A measure of that kind ought to pass. The only fear we have is that the St. Louis Bar Association are too timid with regard to the matter. The ax ought to be laid at the root of the evil. The corporation law of Missouri contemplated that the capital stock of every corporation should be paid up in money. This rule was let down by the Supreme Court of Missouri, affirming the St. Louis Court of Appeals, to the doctrine that it might be paid up in property such as the corporation might lawfully purchase and use, provided the property were turned in at a fair valuation.<sup>1</sup> But for many years it was the undoubted law in Missouri that, in the case of payment of shares in property, the courts would see to it that a fair valuation was placed upon the property, and if the property were overvalued, even to a slight extent, the shareholder would be assessable in the event of the insolvency of the corporation, and wholly without reference to the question of fraud. This doctrine is strongly brought out in *Shickle v. Watts*,<sup>2</sup> and it was the unquestioned law of Missouri until December 17th, 1895, when the Supreme Court of Missouri let the law down to what has been aptly called the chips-and-whetstones doctrine, which is to the effect that a transaction by which property is given to a corporation in payment for shares is binding, even as

<sup>1</sup> *Liebke v. Knapp*, 79 Mo. 22.

<sup>2</sup> 94 Mo. 410.

against a creditor of the corporation, unless it is impeached for fraud.<sup>1</sup>

What is *fraud* in such a case? What, on the other hand, is good faith? The Missouri court says that a gross overvaluation of the property received by the corporation in payment for the shares would be evidence of fraud. But what overvaluation will be deemed gross? Then an overvaluation is only *prima facie* evidence of fraud. It may be rebutted by showing that the parties were merely optimistic as to the value of the property turned in. Under this wretched doctrine a new impulse will be given to the creating of corporations with only chips and whetstones for their capital stock. The plant and franchise of a gas-light company—such was the property in *Woolfolk v. January*, just referred to—or a worthless patent right, may be turned in at an enormous valuation, in perfect good faith as among the co-adventurers themselves, but under a cheerful optimism as to the extent to which it will enable the corporation to earn money for dividends. The result is that corporations have been springing up all over Missouri without any substantial capital stock, and that a new and accelerated impulse will be given to this industry by the decision last referred to. Now, under the laws of Missouri, there is no superadded individual liability. It is safe to say that where payment of shares is made in property, the property is not turned in at its real valuation in one case out of a hundred. The result is that our business life is permeated, honeycombed and everywhere threatened with mushroom corporations, having only a pretended capital stock.

What adds to this calamity is that the Supreme Court of Missouri, while frequently repeating the doctrine that the capital stock of a corporation is a trust fund for its creditors, hold that the directors, who are the trustees of this fund, may deal with it in contemplation of insolvency by preferring particular creditors over others of equal merit, and even by preferring themselves over outside creditors. To put an end to this wretched state of things, the St. Louis Bar Association are making their present effort. It must be recalled that the only recourse of the creditor against the corporation, in the event of its insolvency, is the assessment of the shareholders who have not paid up their shares. But if, in the transaction by which they take their shares and pay for

<sup>1</sup> *Woolfolk v. January*, 131 Mo. 620. It cannot escape attention that Mr. Justice Sherwood, who wrote the clear, able and satisfactory opinion in *Shickle v. Watts*, now assents to

the overruling of that case, under the statement that what the court overrules in that case was a *dictum*, when it was the very pith and marrow of the decision.

them, they can create value by merely calling worthless things valuable—by calling chips and whetstones gold and silver,—just as Hans in the German story converted his lump of gold into a common field stone,—it being just as good as gold to him, since he could use it for a grindstone,—on the stoical theory that you can be made full by merely imagining yourself so, and that hunger has no pangs for you provided that you can imagine that you have had plenty to eat;—and if, when the inevitable stares them in the face, they can take the few chips and whetstones which they have left and turn them over to their banker by way of preference, or to some of their rascally directors, then there is a culmination of the calamities growing out of the rule of the corporation.

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**BILLS INTRODUCED IN CONGRESS TO RAISE THE SALARY OF DISTRICT JUDGES TO \$6,000.**—We notice from a perusal of the record of the proceedings of Congress, that bills to raise the salary of District Judges to \$6,000, and to reimburse them for their expenses when traveling and holding District or Circuit Courts other than their own, have been introduced. Senator Cullom of Illinois has introduced such a bill in the Senate, and Congressman E. D. Cooke, of the same State, in the House. In the House, the bills have been referred to the Judiciary Committee, of which Hon. D. B. Henderson is the chairman. When gentlemen of the ability and national reputation of those referred to lend themselves to the passage of such a measure, it must be because there is immediate and pressing need therefor. It is a matter of public notoriety, and one to be deplored, that our Federal Judges are ill-paid for the important and exacting public services they render to the people and the country. Of none is this so readily recognized among the profession as it is with reference to our District Judges. The salary of \$5,000 is totally insufficient for the ability, learning and labor required of them. There are no harder-worked and painstaking jurists than our District Judges. They not only must attend to the litigation in the District Courts, which, of itself, is of a complex nature, comprehending admiralty, criminal, U. S. civil, and some common-law and equity cases, but since the creation of the Circuit Court of Appeals in 1891, they are frequently required to sit as members of that appellate tribunal. Besides this, they are often required to do duty in the overcrowded Circuit Courts. In fact, they are subject to judicial service, under the present system, in three different courts, viz.: (1) The District Court, (2) the Circuit Court,

and (3) the Circuit Court of Appeals. In each of these tribunals, the class of litigation and the character of cases are widely different and necessarily require not alone ability and learning of a high order, but continuous and assiduous attention and labor. We personally know of one instance in the Ninth Circuit, where one of the District Judges, besides disposing of his own calendar, is frequently called upon to attend to Circuit Court business at home and elsewhere, and in addition to all this, has the reputation of having participated in as many, if not more, decisions in the Circuit Court of Appeals (which meets three times a year) than any of the other Circuit or District Judges. While it is well known that the Circuit Court of Appeals have relieved and are reducing right along the formerly immense calendar of the Supreme Court, still this has been done at the expense of additional labor and time on the part of the Circuit and District Judges. The Circuit Judges now get \$6,000. There is no longer any reason why the District Judges should not get the same pay. The District Courts, since the creation of the Circuit Courts of Appeal, are no longer courts of inferior jurisdiction as compared with the Circuit Court. The sum of \$5,000, which the District Judges receive, is ridiculously small. Aside from the fact that the District Judges do Circuit Court and Circuit Court of Appeals work, it should be increased in consideration of the duties performed in the District Courts alone. It has often been, to us, a matter of wonder that men of the ability and learning who have graced the Federal ermine, have condescended to retire from private life and give up lucrative practice for the small compensation and heavy responsibility incident to the position. Of course, we appreciate — and be it said to their credit — that the honor and prestige which a life-long position on the bench imparts, are to many lawyers, the great attraction. But the fact that we have been fortunate in the past in obtaining great and honest jurists for a small and niggardly compensation is no guarantee that we will always be equally fortunate in the future. The average successful lawyer of to-day, particularly in large cities, the home of corporations, makes from \$10,000 to \$20,000 a year. We understand that the Chicago Bar Association has taken the matter in hand and, in fact, appointed a committee which drafted the bills that were introduced in Congress. They are to be commended for their good sense and appreciation of the necessities and requirements of the situation. Following is the text of the bills as introduced:—

A bill to amend section five hundred and fifty-four of the Revised Statutes of the United States.

Be it enacted by the Senate and House of Representatives of the United

States of America in Congress assembled, that the salaries of the several judges of the District Courts of the United States shall hereafter be at the rate of six thousand dollars per annum.

#### EXPENSES.

A bill to amend section five hundred and ninety-seven of the Revised Statutes of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section five hundred and ninety-seven of the Revised Statutes of the United States be, and is hereby amended so as to read as follows: —

“ Sec. 597. Whenever a district or circuit judge holds a district or circuit court in a town or city in which he is not a resident or usually holds court, his expenses, not exceeding ten dollars a day, during the time of his attendance upon said court or courts certified by him, shall be paid by the marshal of said district as a part of the expenses of the court, and shall be allowed in the marshal's account.

Sec. 2. That all acts or parts thereof inconsistent with the foregoing provisions are hereby repealed.”

We sincerely hope that both bills, but particularly the first, will pass, and we shall certainly do all we can to assist in their passage.

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THE DEATH OF HON. ISAAC C. PARKER, Judge of the United States District Court for the Western District of Arkansas, removes one of the most remarkable and unique figures that ever sat upon the Federal bench. It took place on the 17th of November, at his home in Fort Smith, Ark., from a disease of the heart. For nearly a quarter of a century he had presided as sole judge in that court. It was a frontier court and had a very peculiar criminal jurisdiction, embracing all crimes committed in the adjacent Indian Territory by Indians against white persons, by white persons against Indians, or by white persons against each other. It did not extend to crimes committed by Indians among themselves. Exercising a jurisdiction over a territory characterized by great outlawry, largely promoted by the mingling of the two races therein, the duties which his position called upon him to discharge required the possession of a strong mind, a courageous breast, and a firm hand. Criminal justice was vigorously executed in his court; and his conduct did not escape animadversion and libelous diatribes, originating in the minds and breasts of the lawyers who habitually figured there as defenders of criminals. One of these libels was that Judge Parker had boasted that he would advance his record to one hundred executions before retiring from the bench. It is almost needless to say that he never made such a boast, nor anything like it. The

story was coined out of pure malice. But the fact that, during the period of his administration of the office, eighty-nine persons were executed under sentences passed in his court, gave a certain currency to the story. Within recent years a change took place under which his decisions were reviewed by the Supreme Court of the United States on writ of error. A good many of them were reversed on technical grounds; and perhaps the history of these reversals will illustrate, as well as anything else, the manner in which the execution of the criminal laws throughout portions of our country is hampered by judicial casuistry in the appellate benches. The following, which we take from the *Encyclopedia of the Southwest* is a sketch of the career of this remarkable man:—

The history of the Parker family is not easily traced. The ancestors came from England, settled in Massachusetts and spread West. Isaac P. Parker was born in Belmont County, Ohio, October 15th, 1838. His father, Joseph Parker, was a farmer and a man of remarkable energy, strict in domestic discipline, but mild and persuasive in his methods. He moved to Ohio, where he was married. He died in that State in 1879, aged 66. His mother, Jane Shannon, was a native of Belmont County, Ohio, and was the daughter of John Shannon. She was a woman remarkable for her strong mental qualities and business habits, possessing great force of character. She was a member of the Methodist church, and her son, who has attained distinction, attributes his success mainly to her influence and training. She died October 18, 1870.

Isaac attended school when not actively employed on the farm, and rapidly acquired a knowledge of fundamental principles. These advantages he improved by private study and application, becoming thoroughly versed in the English branches. At the age of sixteen he had resolved to study law, and at the age of seventeen he taught school as the means of accomplishing his purpose. He was ambitious to work out his destiny, unaided by others. For four years he alternately attended Barnesville Academy and taught school. He was fond of disputation, though very young, and took part in the discussion of the Kansas-Nebraska question, then the absorbing topic of political and social circles.

In 1859 Mr. Parker began the practice of law at St. Joseph, Missouri, where he continued to reside and labor for fourteen years. He soon made friends and a professional reputation, and from April, 1861, to April, 1864, he was City Attorney of St. Joseph. Notwithstanding his official position, he was in the militia service of the State, under Generals Rosecrans and Curtis, department commanders, from September, 1861, till the winter of 1864. He was in no battle of note, though he took part in several skirmishes. During the greater part of his time he was detailed as assistant provost marshal of St. Joseph. At the election in November, 1864, he was chosen a presidential elector on the Republican ticket and cast his vote for Mr. Lincoln for President. At the same election he was chosen State's Attorney for the Ninth Judicial Circuit, and held the office until September, 1861. In November, 1868, he was elected Circuit Judge of the Ninth Judicial Circuit for a term of six years; but having been

nominated for Congress in 1870, and considering it indelicate to hold the office of Judge while canvassing for a political position, he resigned his place in September of that year, and in the following November was elected to represent his district in the Forty-second Congress. Two years afterwards he was elected to the Forty-third Congress. During his first term he was a member of the committee on Territories and chairman of the committee on Expenditures in the Navy department.

Although the legislature redistricted the State and made his district three thousand Democratic, yet Judge Parker was re-elected in 1872 by a majority of one hundred and forty-three. In the Forty-third Congress he was a member of the committee on Appropriations. While in Congress, Judge Parker succeeded in carrying all his local measures; engineered the Indian Appropriation Bill, and made considerable reputation as advocate of a peace measure in solving the Indian problem. Time has demonstrated the wisdom of this policy, as the succeeding administration adopted it.

In 1875, President Grant nominated Judge Parker to be Chief Justice of Utah, and he was confirmed by the Senate, but he declined the position at the request of President Grant to accept that of United States District Judge for the Western District of Arkansas, a life appointment, which he held up to the time of his death. His jurisdiction extended over a part of Arkansas and the entire Indian Territory, involving a large area and an immense amount of work, perhaps more than any other judge in the Union is required to undergo.

Judge Parker was a member of the order of Odd Fellows, and also of the Knights of Honor. He was reared in the Democratic faith and voted the Democratic ticket until the breaking out of the Rebellion, when he became a Republican and so remained. Being a Northern man, he naturally drifted into the Republican party as a Union man. He was a believer in the doctrines of the Christian religion, though not connected with any religious denomination.

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**THE TREATY OF ARBITRATION BETWEEN THE UNITED STATES AND GREAT BRITAIN.**—On January 11th the President of the United States transmitted to the Senate, in an appropriate message, one of the most important documents that was ever submitted to that body for its ratification. It consisted of nothing less than a treaty between the United States and Great Britain, whereby "all questions of difference between them which they may fail to adjust by diplomatic negotiations" shall be submitted to an "arbitral tribunal" composed of jurists and an umpire. Two different tribunals are provided for different classes of questions, and there is a special provision relating to the constitution of the arbitral tribunal where the question involved is one which concerns a particular State or Territory of the United States. In case of a failure of the nominating body designated in two of the articles to agree upon an umpire, the King of Sweden and Norway is to appoint such umpire. Further details of the treaty will not be given,



since it will be more satisfactory to our readers to peruse the text of it, which we subjoin. It has long been the practice of Great Britain and the United States to submit to arbitration, by special treaties, matters of difference arising between them, and this uniform practice of nearly a century furnishes good reason to believe that future differences would have been settled in the same way without this treaty. There is, however, a class of questions, like the Venezuela imbroglio, now so happily adjusted, over which national vanity and national rivalry are apt to lead to a dangerous inflammation of the public opinion of both countries; and it is by no means certain that, in the absence of such a treaty, providing in advance a peaceful method of settlement, jingoism, the desire for active service and promotion in the army and navy, and, above all, the patriotism of prospective contractors and quartermasters,— might not bring about the calamity — the unspeakable calamity — of a war between the two branches of the great Anglo-Saxon family. We may reasonably hope that this treaty forever disposes of the possibility of such a war.

The people of both countries are entitled to take pride in the fact that this is the first treaty of the kind which has ever been made between two great powers, by which they have agreed to submit to the arbitration of a quasi-judicial tribunal all matters of difference which may arise between them in a given period of time, including disputes as to territorial boundaries. That this treaty is a great step forward in the progress of general peace need hardly be suggested. That it will have an important influence in promoting the practice of submitting to arbitration disputes among other powers than the contracting parties in this case, is to be hoped for and is altogether probable. One of its most important results will be to draw into a closer union all the members of the English-speaking race. Coupled, as it is, with an acknowledgment by Great Britain, in the Venezuela treaty referred to in our last issue, of the Monroe doctrine as it is understood in this country, it assures to us that hegemony in the affairs of the Western continent which naturally belongs to us, but which the European powers have been loth to recognize. It minimizes the danger of war between the two countries, and forestalls those financial and business calamities which flow from the mere rumor of war. It would be too much to say that it will have the effect of drawing the two nations into an offensive and defensive alliance; for no such provision is contained in it. But it tends strongly in that direction; for it is in substance an agreement between the two peoples not to go to war with each other over any difference which can arise between them for a period of five years, so long as it can be settled by the decision of an

impartial judicial tribunal. United as they are by so many ties of history, tradition, blood, religion and community of institutions, a formal agreement to live together in peace, which, it is to be hoped, will on its expiration be renewed and strengthened, will of itself have a tendency to draw the two peoples into a closer union; and neither will be likely to look on with patience while the other is maltreated by a third power or by a combination of third powers.

The following, omitting the preamble, is the text of the treaty:—

#### ARTICLE I.

The high contracting parties agree to submit to arbitration, in accordance with the provisions and subject to the limitations of this treaty, all questions in difference between them which they may fail to adjust by diplomatic negotiation.

#### ARTICLE II.

All pecuniary claims or groups of pecuniary claims which do not in the aggregate exceed £100,000, in amount, and which do not involve the determination of territorial claims, shall be dealt with and decided by an arbitral tribunal constituted as provided in the next following article.

In this article and in article 4 the words "groups of pecuniary claims" mean pecuniary claims by one or more persons arising out of the same transactions or involving the same issues of law and of fact.

#### ARTICLE III.

Each of the high contracting parties shall nominate one arbitrator who shall be a jurist of repute, and the two arbitrators nominated shall, within two months of the date of their nomination, select an umpire. In case they should fail to do so within the limit of time above mentioned, the umpire shall be appointed by agreement between the members for the time being of the Supreme Court of the United States and the members for the time being of the Judicial Committee of the Privy Council in Great Britain, each nominating body acting by a majority. In case they shall fail to agree upon an umpire within three months of the date of an application made to them in that behalf by the high contracting parties or either of them, the umpire shall be selected in the manner provided for in article X.

The person so selected shall be the president of the tribunal, and the award of the majority of the members thereof shall be final.

#### ARTICLE IV.

All pecuniary claims or groups of pecuniary claims which shall exceed £100,000 in amount, and all other matters in difference, in respect of which either of the high contracting parties shall have rights against the other under treaty or otherwise, provided that such matters in difference do not involve the determination of territorial claims, shall be dealt with and decided by an arbitral tribunal, constituted as provided in the next following article.

#### ARTICLE V.

Any subject of arbitration described in article IV. shall be submitted to the tribunal provided for by article II., the award of which tribunal, if unanimous,

shall be final. If not unanimous either of the contracting parties may within six months from date of the award demand a review thereof. In such case, the matter in controversy shall be submitted to an arbitral tribunal consisting of five jurists of repute, no one of whom shall have been a member of the tribunal whose award is to be reviewed, and who shall be selected as follows, viz.: Two by each of the high contracting parties and one, to act as umpire, by the four thus nominated, and to be chosen within three months after the date of their nomination. In case they shall fail to choose an umpire within the limit of time above mentioned, the umpire shall be appointed by agreement between the nominating bodies designated in article III., acting in the manner therein provided. In case they fail to agree upon an umpire within three months of the date of an application made to them in that behalf by the high contracting parties, or either of them, the umpire shall be selected in the manner provided for in article X. The person so selected shall be the president of the tribunal and the award of the majority of the members thereof shall be final.

#### ARTICLE VI.

Any controversy which shall involve the determination of territorial claims shall be submitted to a tribunal composed of six members, three of whom (subject to the provisions of article VIII.) shall be judges of the Supreme Court of the United States, and justices of the Circuit Courts, to be nominated by the President of the United States, and the other of whom (subject to the provisions of article VIII.) shall be judges of the British Supreme Court of Judicature or members of the Judicial Committee of the Privy Council, to be nominated by her Britannic majesty, whose award by a majority of not less than five to one shall be final. In case of an award made by less than the prescribed majority, the award shall also be final, unless either power shall, within three months after the award has been reported, protest that the same is erroneous, in which case the award shall be of no validity.

In the event of an award made by less than the prescribed majority and protested as above provided, or if the members of the arbitral tribunal shall be equally divided, there shall be no recourse to hostile measures of any description until the mediation of one or more friendly powers has been invited by one or both of the high contracting parties.

#### ARTICLE VII.

Objection to the jurisdiction of an arbitral tribunal constituted under this treaty shall not be taken except as provided in this article.

If before the close of the hearing upon a claim submitted to an arbitral tribunal constituted under article III. or article V., either of the high contracting parties shall move such tribunal to decide, and thereupon it shall decide that the determination of such claim necessarily involves the decision of a disputed question of principle of grave general importance affecting the national rights of such party as distinguished from the private rights whereof it is merely the international representative, the jurisdiction of such arbitral tribunal over such claim shall cease, and the same shall be dealt with by arbitration under article VI.

#### ARTICLE VIII.

In cases where the question involved is one which concerns a particular State or Territory of the United States, it shall be open to the President of the United

States to appoint a judicial officer of such State or Territory to be one of the arbitrators under article III. or article V., or article VI.

In like manner in cases where the question involved is one which concerns a British colony or possession, it shall be open to her Britannic majesty to appoint a judicial officer of such colony or possession to be one of the arbitrators under article III. or article V., or article VI.

#### ARTICLE IX.

Territorial claims in this treaty shall include all claims to territory and all other claims involving questions of servitudes, rights of navigation and of access, fisheries and all rights and interests necessary to the control and enjoyment of the territory claimed by either of the high contracting parties.

#### ARTICLE X.

If in any case the nominating bodies designated in article III. and V. shall fail to agree upon an umpire in accordance with the provisions of said articles, the umpire shall be appointed by his Majesty the King of Sweden and Norway.

Either of the high contracting parties, however, may at any time give notice to the other that, by reason of material changes in conditions as existing at the date of this treaty, it is their opinion that a substitute for his Majesty should be chosen either for all cases to arise under the treaty or for a particular specified case already arisen; and thereupon the high contracting parties shall at once proceed to agree upon such substitute to act either in all cases to arise under this treaty or in a particular case specified as may be indicated in said notice; provided, however, that such notice shall have no effect upon an arbitration already begun before an arbitral constituted tribunal under article III.

The high contracting parties shall at once proceed to nominate a substitute for his majesty, in the event that his majesty shall at any time notify them of his desire to be relieved from the function graciously accepted by him under this treaty, either for all cases to arise thereunder or for any particular specified case already arisen.

#### ARTICLE XI.

In case of the death, absence or incapacity to serve of any arbitrator or umpire, or in the event of any arbitrator or umpire omitting or declining or ceasing to act as such, another arbitrator or umpire shall be forthwith appointed in his place and stead in the manner provided for with regard to the original appointment.

#### ARTICLE XII.

Each government shall pay its own agent and provide for the proper remuneration of the counsel employed by it, and of the arbitrators appointed by it, and for the expense of preparing and submitting its case to the arbitral tribunal. All other expenses connected with any arbitration shall be defrayed by the two governments in equal moieties.

Provided, however, that if in any case the essential matter of difference submitted to the arbitration is the right of one of the high contracting parties to receive disavowals of or apologies for acts or defaults of the other not resulting in substantial pecuniary injury, the arbitral tribunal finally disposing of the said matter shall direct whether any of the expenses of the successful party shall be borne by the unsuccessful party, and if so, to what extent.

## ARTICLE XIII.

The time and place of meeting of an arbitral tribunal and all arrangements for the hearing and all questions of procedure shall be decided by the tribunal itself.

Each arbitral tribunal shall keep a correct record of its proceedings and may appoint and employ all necessary officers and agents.

The decisions of the tribunal shall, if possible, be made within three months from the close of the arguments on both sides. It shall be made in writing and dated, and shall be signed by the arbitrators who may assent to it.

The decision shall be in duplicate, one copy whereof shall be delivered to each of the high contracting parties through their respective agents.

## ARTICLE XIV.

This treaty shall remain in force for five years from the date at which it shall come into operation, and further, until the expiration of twelve months after either of the high contracting parties shall have given notice to the other of its wish to terminate the same.

## ARTICLE XV.

The present treaty shall be duly ratified by the President of the United States, by and with the consent of the Senate thereof, and by Her Britannic Majesty, and the mutual exchange of ratifications shall take place in Washington or in London within six months of the date thereof, or earlier if possible.

The treaty was signed in duplicate at Washington by Richard Olney, acting under a special power from the President of the United States, and by Sir Julian Pauncefote, acting under a like power from Her Britannic Majesty.

## NOTES OF RECENT DECISIONS.

**BILL OF EXCHANGE: FRAUDULENT ALTERATION: EFFECT OF NEGLIGENCE OF THE ACCEPTOR TO SEE THAT THE BILL IS SO DRAWN THAT IT CANNOT BE FRAUDULENTLY ALTERED.**—On the 31st of July last the British House of Lords rendered a decision of great importance to the commercial world on a question which has been thrown into doubt by a few decisions, but on which there ought to be no doubt.<sup>1</sup> The question was whether there is any duty on the part of the acceptor of a bill of exchange, to see, before he accepts the bill, that it is not so drawn as to render a subsequent alteration possible. The Lords (affirming the judgment of the Court of Appeal)<sup>2</sup> resolve this question in the negative. The case was that S. drew a bill of exchange on the respondent. The bill was drawn upon a stamp sufficient to cover a much larger sum than that which appeared on the face of it, and spaces were intentionally left in the body of the bill which would facilitate alterations. After the respondent had accepted the bill, S. fraudulently inserted words and figures which altered the amount from 500*l.* to 3,500*l.* The bill so altered afterwards came into the hands of the appellant as a bona fide indorsee for value. It was held that the acceptor was bound to the extent of £500 only.

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**CONSTITUTIONAL LAW: CONSTITUTIONALITY OF INHERITANCE TAX LAWS.**—In a case which may be cited as *Re Drake Estate*, which has come to us in pamphlet form,<sup>3</sup> Judge Carter, of the County Court of Cook County, Illinois, holds that the statute of that State taxing inher-

<sup>1</sup> The case was *Scholfield v. Lord Londesborough*, 75 L. T. Rep. 254.

<sup>2</sup> The judgment of the Court of Appeal is reported in 72 L. T. Rep. 46, and in (1895) 1 Q. B. 596, and this judgment affirmed, though on different grounds, a judgment of Mr. Justice Charles, reported in 71 L. T. Rep. 76, and in (1894) 2 Q. B. 660. That there has been doubt upon the

question is shown by the fact that from the judgment of the Court of Appeal Lord Justice Lopes dissented. See also *Young v. Grote*, 4 Bing. 253, which their Lordships in the final decision found it necessary to distinguish.

<sup>3</sup> It is also printed in full in the *Legal News* for November 28th, 1896.

itances is unconstitutional and void. The opinion is a valuable one in that it seems to be an exhaustive review of what judicial precedent there is on the question. A peculiarity of the Illinois statute is that it provides for a graduated tax, — three per centum upon all estates of \$10,000 or less; four per centum on all estates of \$20,000 or less; five per centum on all estates of \$50,000 and less, and six per centum on all estates above \$50,000. The leading objection to its validity seems to have been that it violates the principle of uniformity, which is at the bottom of all just taxation, and which is required in respect of taxes laid upon property and business by the constitution of Illinois. This objection seems to be well taken if such a drawback in favor of the State can be regarded as a tax at all. The sound view seems to be that it is not a tax upon property in the ordinary sense of the term, but is a contribution which the State requires to be yielded to itself upon the devolution of the property which takes place on the happening of the death of its owner.<sup>1</sup> The *Chicago Legal Adviser*, for whose opinion we entertain much respect, expresses the view that Judge Carter has arrived at the correct conclusion, and that his judgment is likely to be confirmed by the Supreme Court of Illinois. This may be so; if so it is to be regretted. That court is certainly liable to take a narrow view when dealing with questions of constitutional law. This is shown by its decision overthrowing the statute of that State establishing what is called the Torrens system of land transfer. But the concluding sentence of Judge Carter's opinion is not reassuring. He says: "Believing, as I do very strongly, in the fundamental idea of a tax inheritance law, and that when such a law is properly drawn it is one of the most satisfactory methods of taxation, it is with great reluctance that I have been forced to the conclusion that the classification attempted in this law causes unjust discrimination between persons, is arbitrary, unreasonable and not based upon sound principles of public policy, and that the law must be held unconstitutional." It is submitted that a judge cannot declare a statute unconstitutional because it creates "an unjust discrimination between persons," unless the constitution in terms prohibits such discriminations; that it is beyond the power of the judicial courts to declare a statute unconstitutional, because, in the opinion of the judge or judges, it "is arbitrary and unreasonable," for the legislature is the best, and it is believed the exclusive judge as to that; and that it is still less within the power of

<sup>1</sup> *United States v. Perkins*, 108 U. S. 625, 628, where the inheritance tax law of New York was held not in con-

flit with the Constitution of the United States.

the judicial courts to declare a statute unconstitutional because "not based upon sound principles of public policy;" since what is public policy is not a judicial question where the legislature has spoken. An act of the legislature is the highest evidence of public policy.

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**CONSTITUTIONAL LAW: STATE REGULATION OF TOLLS AND CHARGES ON TURNPIKE ROADS — IMPAIRING THE OBLIGATION OF CONTRACTS — DEPRIVING OF PROPERTY WITHOUT DUE PROCESS OF LAW — DENYING THE EQUAL PROTECTION OF THE LAWS.**—The decision of the Supreme Court of the United States, rendered on the 14th of December last, in the case of the *Covington & Lexington Turnpike Road Co. v. Sandford*,<sup>1</sup> affirming in part, but reversing the judgment of the Court of Appeals of Kentucky,<sup>2</sup> is made by Mr. Justice Harlan, who writes the opinion of the court, from which there is no dissent, to rest upon very clear and satisfactory grounds. Before proceeding to state the conclusions of the court, it may be premised that the case belongs to a numerous class which exhibit a tendency on the part of State legislatures, in regulating the tolls and charges of corporations chartered to perform public duties, to override the rights of such corporations and in effect to confiscate their property; as well as the tendency of the highest courts of the States to sustain such acts of their legislatures. It is therefore satisfactory to know that in this case several of the conclusions of the Court of Appeals of Kentucky, whose opinion was written by Judge Pryor, are quoted and approved by the Supreme Court of the United States.

Briefly stated, the legislature of Kentucky had incorporated, in 1834, a turnpike company and had subsequently divided it into two corporations, one of them composed of stockholders residing north of a given point on the line, and the other composed of stockholders residing south of that point; and had provided, in the statute creating such division, that each company should possess and retain "all the powers, rights and capacities, in severalty, granted at the time of incorporation and amendments thereto, of the original company;" that subsequently, in 1865, the legislature of Kentucky had imposed a restraint upon the company now complaining, the one possessing the northern section of the turnpike road, in respect of the amount of tolls which it might charge; and that in 1890 a further act was passed by the legislature of Ken-

<sup>1</sup> Not yet reported.

Appeals is reported in 20 S. W. Rep.

<sup>2</sup> The judgment of the Court of 1081.



tucky imposing an additional restraint in respect of such tolls and charges, which the company disregarded. Thereupon citizens living near the line brought the present suit in equity in a court in Kentucky to enjoin the company from enforcing the rates prescribed by the prior statutes; and such proceedings, arising on a demurrer to an answer of the company, which necessarily admitted the facts well pleaded in the answer, were had, that a perpetual injunction was granted restraining the company from demanding and collecting tolls under prior statutes; to reverse which decree the present writ of error was prosecuted in the Supreme Court of the United States.

Three principal questions arose on the record: 1. Whether the act of 1890 impaired the obligation of any contract that the turnpike company had with the State touching the matter of tolls. 2. Whether, independently of any question of contract, the act made such a reduction in tolls as to amount to a deprivation of the company's property without due process of law, in violation of the Fourteenth Amendment to the constitution of the United States. 3. Whether the act is repugnant to the clause of the Federal constitution forbidding the denial by the State to any person within its jurisdiction of the equal protection of the laws. The first and third of these questions were resolved in substantial accordance with the views of the Court of Appeals of Kentucky; but with respect to the second, the Supreme Court of the United States were unable to concur with the Kentucky court, and accordingly reversed its decree and remanded the cause for further proceedings, which might arise upon the proofs adduced.

1. It is scarcely possible, in a brief summary, to do justice to the very clear and satisfactory opinion written by Mr. Justice Harlan; but it may suffice to say that, upon the first question, namely, whether the contract between the State of Kentucky and the original turnpike corporation, under which, it seems to have been admitted, that corporation had the right to levy such tolls as would enable it, after properly maintaining its road, to declare a dividend of fourteen per cent per annum, had passed to the present corporation after the severance of the original corporation into two distinct corporations,—the court proceeded, upon analogy to the settled doctrine of the court, that exemptions from public taxation accorded by the legislature of a State to a corporation, being in derogation of public right and being construed *strictissimi juris* against the corporation and in favor of the public, do not pass to any new corporation, formed upon a reorganization of the original corporation or its consolidation with some other corporation, but are determined by such change,—holding that the same principle

applies, so as to prevent the exemption from legislative control in respect of its tolls from passing to the new corporation, created by the severance of the original corporation, as already stated. Upon this subject Mr. Justice Harlan says:—

The act of 1834 having given to the original corporation an exemption or immunity from legislation that would prevent it from earning as much as fourteen per cent upon the capital stock expended upon its road and for repairs, the contention of the defendant is that this exemption or immunity passed to the two corporations created by the act of 1851, and which, by the terms of that act, succeeded "to all the powers, rights and capacities" granted by the act of 1834 to the original corporation. This view was properly rejected by the Court of Appeals of Kentucky. It was well said by Judge Pryor, speaking for that court, that "the liability and duties owing the State and the public by the one corporation had been severed by the act of 1839, and by the act of 1851 two new corporations were created, with the rights and powers of the one entirely distinct from the other, and no means of ascertaining what per cent the old corporation would have made upon its stock. In fact, the old corporation was extinct; and to hold that the new corporations were exempt from legislative interference would be to restrain the exercise of legislative power by implication, when a reasonable construction of the new grants must lead to a different conclusion."

Then, after stating, with a citation of the decisions, the well-known doctrine of the court with regard to the non-assignability of exemptions from taxation, the learned Justice proceeds to say:—

The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the State, and it should never be implied that the legislative department intended to surrender it. Such an intention should not be imputed to the legislature if it be possible to avoid doing so by any reasonable interpretation of its statutes. It is as vital that the State should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. We admit there is some ground for the contention that, by the grant in the act of 1851 to each of the two corporations named in it, of "the powers, rights and capacities" granted to the corporation of 1834, the legislature intended to exempt the new corporations, as it did the original one, from all legislation that would prevent them from earning as much as fourteen per cent on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporations such powers, rights and capacities as were necessary to the successful working of the respective roads, and not an exemption from legitimate and ordinary legislative control of their affairs and business, it must, in the interest of the public, be so interpreted. \* \* \* For the reasons stated, we are of opinion that when the act of 1890 was passed, the power of the general assembly over the subject of tolls to be exacted by the plaintiff in error was not impaired or

restrained by any contract with the State in reference to the amount which the company might earn from the use of its road.

2. The next question was whether the act of 1890, by its necessary operation, deprived the company of its property without due process of law, in that if tolls could not be charged in excess of those prescribed by this act, the company could not possibly maintain its road or derive any profit whatever for its stockholders. As already stated, this question arose upon the state of facts set up by the answer of the company, which were necessarily admitted by the demurrer. That state of facts showed, in plain language, that the act of 1890 was confiscatory, and that, under the limits of tolls and charges prescribed by that act, the company could not maintain its road and pay any dividends to its stockholders. The court hold that this was tantamount to a taking of the company's property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States; and in so doing it merely reaffirmed a number of its previous decisions, and notably the Texas Railway Commission case.<sup>1</sup> Roundly stated, the doctrine of these cases is that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as practically to destroy the value of the property of companies engaged in the carrying business; and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws.

This doctrine was very clearly and strongly set out in the very satisfactory opinion of the court, delivered by Mr. Justice Brewer, in the Texas Railway Commission case,<sup>2</sup> where the court said that, beyond doubt, it was within the power and duty of the courts

to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if so found to be, to restrain its operation.

<sup>1</sup> Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362. See also Santa Clara Co. v. Southern Pacific Railway Co., 118 U. S. 394; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 189; Minneapolis & St. Louis R. Co. v. Beckwith, 128 U. S. 29; Charlotte &c. Railroad v. Gibbs, 142 U. S. 386, 391; St. Louis & San Francisco Rail-

way v. Gill, 156 U. S. 649, 657; Railroad Commission Cases, 116 U. S. 807, 831; Dow v. Beidelman, 125 U. S. 681; Chicago, Milwaukee &c. Railway v. Minnesota, 134 U. S. 418; Chicago & Grand Trunk Railway v. Wellman, 143 U. S. 839.

<sup>2</sup> Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 367, 399, 410, 412.

Again: —

These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to divest the other of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. \* \* \* If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value? \* \* \* It is unnecessary to decide, and we do not wish to be understood as laying down, as an absolute rule, that in every case a failure to produce some profit to those who have invested the money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others.

Again quoting this language, the court now say:—

The cases to which we have referred related to the power of the legislature over rates to be collected by railroad corporations. But the principles announced in them are equally applicable, in like circumstances, to corporations engaged under legislative authority in maintaining turnpike roads for the use of which tolls are exacted. Turnpike roads established by a corporation, under authority of law, are public highways, and the right to exact tolls from those using them comes from the State creating the corporation.<sup>1</sup> And the exercise of that right may be controlled by legislative authority to the same extent that similar rights, connected with the construction and management of

<sup>1</sup> *California v. Pacific R. Co.*, 127 U. S. 1, 40.

railroads by corporations, may be controlled. A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair and from earning any dividends whatever for stockholders, is as obnoxious to the constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight.

But the court are very careful to qualify this doctrine, lest the court should be understood as deciding that the rights of the stockholders in the corporation are alone to be looked to, and that the corporation is to be allowed to fix such rates as will, under every change of circumstances, yield them a profit. This is not the doctrine of the court. The rights of the public are also to be considered, and it does not follow from the doctrine of the court on this point that, under all circumstances, the people are to be so taxed that the stockholders in the corporation will get dividends. Circumstances may so change that other business may become permanently unprofitable; and conditions may exist under which corporations and their stockholders must submit to such changes, and under which they are not entitled to relief by overburdening the public. This qualification of the doctrine was made by Mr. Justice Brewer in the Texas Railway Commission case in the language already quoted. It is now more fully developed by Mr. Justice Harlan, in the following language:—

It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock. It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by

contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the plaintiff's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable. That inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise. In short, each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. What those other circumstances may be, it is not necessary now to decide. That can be best done after the parties have made their proofs.

3. The third question, whether the Kentucky statute of 1890 deprived the company of the equal protection of the laws of Kentucky, because it imposed a lower rate of tariff upon the company than was imposed by the legislature upon other turnpike companies of the State, was one in respect of which the Supreme Court of the United States had no difficulty in agreeing with the Court of Appeals of Kentucky. Mr. Justice Harlan disposed of it in this language: —

The proposition of the defendant is, that the constitutional provision referred to requires all turnpike companies in the State to be placed by the legislature, when exercising its general power over the subject of rates to be charged upon highways of that character, upon substantially the same footing. Upon this point the Court of Appeals of Kentucky said: "A turnpike road leading into and connected with a populous city like that of the city of Covington could afford to charge less toll by reason of the immense travel upon it than turnpikes in thinly settled portions of the county or State; and hence under former constitutions the legislature has seen proper to regulate the tolls as the turnpike road may happen to be located." The circumstances of each turnpike company must determine the rates of toll to be properly allowed for its use. Justice to the public and to stockholders may require, in respect of one road, rates different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rate would be exorbitant on another road. The utmost that any corporation, operating a public highway,

can rightfully demand at the hands of the legislature when exerting its general powers is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public. If the rates prescribed for the defendant in this case were manifestly much lower—taking them as a whole—than the legislature has by general law, prescribed for other corporations whose circumstances and location are not unlike those of the defendant, a different question would be presented. At any rate, no case of that kind is properly presented by the pleadings, and there is no ground for holding that the act of 1890 denies to the defendant the equal protection of the laws.

## CORRESPONDENCE.

## COMMON SENSE IN CONNECTION WITH THE DOCTRINE OF REASONABLE DOUBT.

The writer's particular attention was called to the strange decision of the Supreme Court of this State in the Paulsell case by some paragraphs in the "Bench and Bar" column of the *Daily Evening Bulletin* of the 21st inst. The statements there made led him to examine the record in that case, and in the Shaghnessy case, and other matters. The opinion, delivered in Department 2, is written in the vigorous English of McFarland, J., and turns wholly upon a phrase of two words employed by the trial judge in instructing the jury upon a reasonable doubt, the case having been reversed because the judge of the court below (Hon. Edward A. Belcher, of the Superior Court of the city and county of San Francisco), "introduced the *new and unused* phrase 'common sense,' and told the jury that the doubt must be based upon that."

The decision is extraordinary, and deserves special notice.

To many who remember the variant and multifarious instructions upon a reasonable doubt that have heretofore been sustained by the same court, the necessity for reversing this case will seem dubious.

It has been hinted by the public press that this reversal will end the case for the reason that the prisoner's father (who for some years prior to his death had been State harbor commissioner), was well and favorably known in political circles in this State, and that the relatives and friends of the prisoner are wealthy and influential. Of course, the mention here or elsewhere of such a matter may serve only to point a moral, to indicate the view that, as a people, we take of such questions. Fancy how such a suggestion would be received in "Merrie England?" — in the land of Jameson? — in the land that loved Jameson, and believed in him, and tried him, and convicted him? The crew of the *Dauntless* are about to be tried for violation of the neutrality laws off the coast of Florida; whatever the state of the evidence may be, does any one suppose they will be convicted? The difference seems to be that in England justice is effectively aided by the laws; here justice is effectually undone according to law.

But, to proceed. If the precise words defining a "reasonable doubt" were contained within a mandatory statute, then it might be said that a departure from the precise statutory language would be fatal. That would not be so, however, if the statute were not mandatory — the rule being familiar that statutes which are not mandatory need not be followed *ipsissimis verbis*; and we know that when the rule to be followed is contained within the unwritten law, it is still more flexible. The definition of a "reasonable doubt" is found only within the unwritten law, *i. e.*, the decisions of the courts. It would



seem, therefore, where a "reasonable doubt" has been defined by the trial judge in words that a person of common understanding could clearly and readily comprehend, that the case ought not to be reversed merely for the reason that a *set form* was not used. That view would gain added force if it chanced that the obnoxious definition had theretofore, under direct criticism, met with the approval of the same appellate tribunal.

The phrase "common sense," the use of which is deemed to be reversible error in said case, in its legal sense, means "common understanding." In that sense it is used in the statutes of this State. An indictment or information is sufficient if it states the acts constituting the offense in such manner as to enable a person of "common understanding" to know what is intended.

It is contended, however, that the phrase under examination is "new and unused." What of that? Unless the fact of its being "*new and unused*" is in itself error, of what materiality is it? At most the use of the phrase would be no more than technical error, unless, of course, it is error, *per se*, to use "new and unused" phrases (?). One feels like submitting such a question as a good Spaniard might: — *Quien sabe — No se sabe — Sabe Dios!* If it was merely a technical error — (provided it was any error at all — and, certainly, it was no more than technical, if it was error), then there was and is a statute regulating such matters precisely, viz.: By Title IX, Chap. IV, Sec. 1258 of the Penal Code of this State, concerning "appeals to the Supreme Court," it is provided that: "*After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.*" The guilt of Paulsell is overwhelmingly displayed by the record. His incredible story, alone, would have produced conviction in any fair mind; but it needed not the exhibition he made — the proofs were full and convincing without a word from him. How, then, could it even plausibly be said that the use of the "*new and unused phrase 'common sense'*" had in anywise injured the prisoner? The veriest schoolman could not give an intelligible affirmative answer — much less a judicial officer, bound by his oath of office and the law of the State to "give judgment without regard to technical errors, or defects, or to exceptions, which do not affect the substantial rights of the parties."

It is understood that there are several cases on their way to the Supreme Court, from Judge Belcher's court, wherein the same instruction was given as that disapproved in the Paulsell case — all of them, the Paulsell case included, being subsequent in point of time of trial to the affirmance of the judgment in the Shaughnessy case, hereafter to be referred to. All of these cases, governed by the rule in the Paulsell case, must be reversed. An examination of the instruction, therefore, will not be without interest, at least, to the practitioner.

Judge Belcher instructed the jury<sup>1</sup> as follows: "Now, the reasonable doubt that you have heard me speak of means precisely what the words import: a fair doubt growing out of the evidence in the case, based upon reason and common sense. It is such a doubt as may leave the minds of the jury, after considering all of the evidence in the case, in that state that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge."

<sup>1</sup> Supreme Court Record, No. 175, Transcript on Appeal, p. 25.

Now, if the Supreme Court had not lent its powerful aid, one would have found it difficult to seriously criticise any word or phrase in that charge. All of that portion of the charge following the phrase "common sense" is in the very words of Chief Justice Shaw, and the opening words merely inform the jury that the doubt (which is afterwards described) must grow out of the evidence in the case (not out of something *dehors* the evidence) and be based upon the reason and common understanding of the jury.

Will it be contended that the jury have no right to view the evidence as sensible men?

Is it supposed that the ordinary trial jury is made up of metaphysicians, whose nice calculations would be disturbed by the prefixing of a "new and unused" phrase to their formula?

Really, there is nothing to argue.

Even if the charge had been the new invention of the trial judge, was that, alone, a sufficient reason for reversing a solemn judgment based upon an unquestionably proper verdict?

The truth is, however, the charge was not new; and the phrase "common sense," as it is found in the collocation, was not "unused."

The same phrase occurs in an instruction approved by Chief Justice Campbell, of the Supreme Court of Michigan, in *People v. Finley*.<sup>1</sup> Needless to say, the opinions of that Court at that time are held in the highest estimation everywhere. Hon. Thos. M. Cooley was then one of its associates, and both he and Chief Justice Campbell are among the most eminent of American jurists and law writers. For a long while Chief Justice Campbell was one of the special lecturers of the Law School of the University of Michigan at Ann Arbor. Commenting upon the instruction of the trial court defining a reasonable doubt in that case, the eminent Chief Justice said: "The instruction given as to what was meant by a reasonable doubt was one of the clearest and most sensible definitions we have ever seen, and such as to be intelligible to any jury."

The instruction was as follows: "A reasonable doubt is a *fair doubt growing out of the testimony in the case*; it is not a mere imaginary, captious or possible doubt, but a *fair doubt based upon reason and common sense*; it is such a doubt as may leave your minds, after a careful examination of the evidence in the case, in that condition that you cannot say you have an abiding conviction to a moral certainty of the charge here made against the respondent."

So, it appears, the phrase "common sense" was not new and unused after all.

But, even if it had appeared to be "new and unused," then the greater need for caution. Ordinarily, in such case, both lawyers and judges consult the text-books for authority. The text-books were at hand. Rice on Evidence, one of the latest text-books on the law of evidence, in the very first section, under the head "reasonable doubt," sets forth, with approval, the entire charge given in *People v. Finley*,<sup>2</sup> and the phrase "common sense" appears in the midst of it. Why were not the text-books consulted?

The learned justice who delivered the opinion of the court in the Paulsell case writes very fine English; but not all fine judicial writing is fine law; it often happens that sound statement is sacrificed for brilliant rhetoric.

<sup>1</sup> 35 Mich. 482.

<sup>2</sup> Rice on Evidence, p. 431.

The phrase "new and unused" is very fine; but it is not very true.

The learned justice should have been minded that he (and the associates who join with him), had already judicially approved of the very phrase, "common sense" when used by the same trial judge in the same connection as there used.

Surely, what was good law last year ought to be good this, unless expressly retracted. Let us see.

In *People v. Shaughnessy*,<sup>1</sup> Judge Belcher instructed the jury<sup>2</sup> as follows: "A reasonable doubt means precisely what the words import: *a fair doubt growing out of the testimony in the case*, based upon reason and common sense. It is such a doubt as may leave the minds of the jury, after consideration of all the evidence in the case," etc.

*That instruction was directly assailed on appeal, and the same judges who reversed the Paulsell case, in affirming the judgment of the Shaughnessy case, said:*<sup>3</sup> "The instruction of the court upon the question of a reasonable doubt and a moral certainty are not open to just criticism."

Of course Judge Belcher had a right to rely upon that judicial approval in future cases, the Paulsell case included.

"New and unused," quotha!

I wonder why the learned justice who wrote the opinion did not set out the whole of the text containing the obnoxious phrase "common sense?" It is the usual course to do so, and it would have been valuable to practitioners as a lesson. By such means lawyers avoid fresh errors.

To the profession, the reason for the reversal of the Paulsell case will doubtless remain as obscure and secret as the riddle that sometime vexed our amiable and well beloved Dundreary, which "no feller could ever find out." With what mingled feelings of delight and despair, — according as particular interest in their cases or general interest in their profession may move them — will the members of the bar behold the reversal of the various other cases from Judge Belcher's court — all tried since the affirmance of the Shaughnessy judgment — because, forsooth, the judge instructed the jury in words "*not subject to just criticism*" in *People v. Shaughnessy*, but — (eleven months later) — declared to be very, very reversible indeed in the Paulsell case. With what equanimity, also, must Judge Belcher behold the overturning of all his work, for a matter whereof he is no whit to blame.

What strides the human intelligence can make in eleven months!

Doubtless the bar will think so, and thinking so, will reflect a great deal. Probably the writer need make no further suggestions!

In closing, gentlemen of the bar, do you think it would be wise or otherwise if the "Commission for the Reform of the Law" were to cause a definition of a reasonable doubt to be enacted into a statute, and thus prevent further guessing?

U. BETT.

SACRAMENTO, CALIF.

[We would say to Col. Bett (and parenthetically to Judge McFarland) that there is nothing very new in this subject. See 2 Thomp. Trials, §§ 2482, 2483. — EDS. AM. LAW REV.]

<sup>1</sup> 110 Cal. 598-604.

<sup>2</sup> 110 Cal., p. 604.

<sup>3</sup> Supreme Court Record, No. 40, Transcript on Appeal, p. 15.

# JURISDICTION OF FEDERAL COURTS OVER CORPORATIONS CREATED BY CONGRESS.

*To the Editors of the American Law Review:*

After reading a note in a recent issue of the *AMERICAN LAW REVIEW* relating to the jurisdiction of the Federal court over suits against corporations created by Acts of Congress, I have decided to briefly review the acts under which the Federal courts have exercised jurisdiction over such suits, and show the present status of cases brought against corporations created or acting under Acts of Congress.

By an examination of the act of March 3d, 1875, supplement to R. S.<sup>1</sup> you will see that Circuit Courts of the United States are given concurrent jurisdiction with the courts of the several States of suits of a civil nature in law or in equity where the matter in dispute exceeds the sum or value of five hundred dollars, and "arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority."

By an examination of Section 2 of said act,<sup>2</sup> you will see that any suit of a civil nature in law or in equity, pending or brought after the enactment of said statute, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and "arising under the constitution or laws of the United States \* \* \* either party may remove said suit into the Circuit Court of the United States for the proper district." It will be noticed that under this statute either party to this suit was authorized to remove the suit to the Federal court of the proper district regardless of when or how the Federal question was raised. The Supreme Court of the United States, under this statute, in what is known as the *Pacific Railway Removal Cases*,<sup>3</sup> hold that the defendant, Railway Co., being created by or acting under an Act of Congress of the United States, could remove an ordinary suit for damages for personal injuries from the State court to the Federal court—the court holding in the cases referred to that a suit against a Federal corporation was a suit "arising under the laws of the United States," the right of action arising, if at all, under the charter of the corporation.

This rule of allowing Federal corporations to remove suits from the State court to the Federal court simply because the corporation was a Federal corporation, has been followed until the statute referred to was amended in 1888, and it will be noticed that the right of removal never depended on whether the particular suit or defense of the corporation was a right or defense arising under the laws of the United States, but was allowed under the broad rule that a suit by or against such corporation was a suit arising under the laws of the United States, because the company was chartered by such laws. After this practice had been followed for some thirteen years we will see by an examination of act of August 18, 1888, that the rule has been somewhat changed.<sup>4</sup> That act provides that the Circuit Court of the United States shall have concurrent jurisdiction with the courts of the several States of suits where the matter under dispute exceeds,

<sup>1</sup> Page 173.

<sup>2</sup> Page 174.

<sup>3</sup> 115 U. S. 1.

<sup>4</sup> Published Laws of the United States, 1887 and 1888, p. 434.

exclusive of interest and costs, the sum or value of two thousand dollars, and "arising under the constitution or laws of the United States," etc. You will notice that this section of the act is substantially the same as the corresponding section of the act of 1875, fixing jurisdiction of the Federal courts, with the exception that the amount is changed from five hundred dollars to two thousand dollars.

But by an examination of Section 2, of this Act of August 13, 1888, you will see that the rule governing the removal of cases from the State court to the Federal court is changed. This section provides that "any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, etc., \* \* \* of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending or may hereafter be brought in any State court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district." It will be observed from an examination of this section and comparing it with the corresponding section of act of 1875, that the right to remove a suit from the State court to the Federal court is entirely changed. Under the act of 1875 either party could remove the suit where the cause of action was one arising under the constitution or laws of the United States. Under the act of 1888 the defendant only can remove a suit from the State Court to the Federal Court, and then only when the Circuit Courts of the United States are given original jurisdiction by section 1, of said Act of August 13, 1888.

It seems, however, that under the Act of August 13, 1888, the courts continued to allow cases to be removed from the State courts to the Federal courts the same as under the Acts of 1875, until the decision of the Supreme Court in the case of *Tennessee v. Union & Planter's Bank*,<sup>1</sup> in which case the statute of August 13, 1888, was construed. This decision was followed by several other decisions of the Supreme Court on the same line, but the judges of the Circuit Court distinguished this line of cases from the *Pacific Removal Case*,<sup>2</sup> on the theory that when the plaintiff filed a petition in the State court and alleged that his suit was a suit against one of these Federal corporations, that that was equivalent to specially pleading that the defendant was incorporated by an Act of Congress, and so it seems, continued to remove the cases to the Federal courts. But an examination of the case of the *Oregon Shortline and Utah Northern Railway Co. v. Skottowe*,<sup>3</sup> will show that this contention is wrong, and that the right to remove depends on what is shown by the plaintiff's petition or pleading at the time defendant's application for removal is filed. In this case it was expressly held that, though the defendant in the lower court was created by and operating its railway under an Act of Congress, the court could not take notice of the fact that it was such Federal corporation unless this fact appeared from the plaintiff's pleading. In other words, the plaintiff filed suit against the defendant in the State court of Oregon, alleging in his petition that the defendant was "a corporation duly organized, existing and doing business in the State of Oregon." This was the only description given by the plaintiff, in his original petition, of the defendant in the lower court. The railway company filed an application for removal of the

<sup>1</sup> 152 U. S. 454.

<sup>2</sup> 115 U. S. Reports.

<sup>3</sup> 163 U. S. 490.

case to the Federal court; the court held, following the decision in the case of Tennessee against Union and Planters' Bank and other cases, that the defendant could not remove the cause of action to the Federal court. The decision of the State court was affirmed by the Supreme Court of the State, and the railway company filed a petition for writ of error in the Supreme Court of the United States. The writ of error was granted, but the judgment of the State court was affirmed, the court holding that, as it did not appear from the plaintiff's petition filed in the lower court that it was a cause of action arising under the laws of the United States, the right of removal did not exist. In this case the railway company contended that when the plaintiff in the lower court alleged that the defendant was a corporation duly organized, this was equivalent to alleging that it was a corporation organized and acting under the laws of the United States; but the Supreme Court held that this was not sufficient, and that the cause of action could not be removed to the Federal court.

So it seems that the right of removal of causes from the State courts to the Federal courts has been greatly curtailed by the Acts of August 13, 1888, if the Supreme Court should continue to follow these decisions.

In other words, if the plaintiff does not want his cause of action to be removed from the State court to the Federal court, when he institutes his suit in a State court, he simply alleges that the defendant company is a body politic, duly incorporated, and by so doing he deprives the railway company of the power to remove a cause of action to the Federal court, which involves no question arising under the laws of the United States except the charter of the railway company; we might say it deprives the defendant of a right that has always been questioned, that is, the right to remove an ordinary suit from the State to the Federal court for no other reason than that the corporation was created by an Act of Congress. But you notice that, at the end of this decision in the *Oregon Shortline v. Skottowe*, there seems to be a saving clause for these corporations created by Acts of Congress, for this language is used: "But even if the court was obliged, under the allegations of plaintiff's complaint, to take judicial notice of the company's charter, no Act of Congress was pointed out under which it was acting when operating the railroad in the State of Oregon. So far as appears, the defendant company existed and was doing business in the State of Oregon solely under the authority of that State, whether express or permissive."

Of course, the railway company will endeavor to make their application for removal conform to this opinion, by setting out the particular Act or Acts of Congress under which they are operating their line of railway.

The Lower House of the United States Congress has several times passed a bill proscribing the citizenship of these Federal corporations, depriving them of the privilege to remove suits brought against them from the State courts on the plea that it is a suit arising under the laws of the United States, to wit, the charter of the corporation.

A careful examination of the decisions under this statute of 1888 will lead us to the conclusion that it is extremely doubtful whether these causes should be removed to the Federal court; and this being the case, it seems that the United States Senate should be urged to pass a House bill settling this matter, by stating that they can be removed or that they cannot. I think that it would

be advisable for every attorney throughout the whole country to write to his senators and ask them to use their efforts to have a bill passed settling this matter. This could only be done by a circular being sent over the country, or by some publication like the *AMERICAN LAW REVIEW* publishing a short statement showing the necessity of such an action on the part of the attorneys throughout the country, and asking all attorneys that might see such statement to write to their senators and urge upon them the passage of such bill.

I sincerely hope that you will continue to bring this matter before the readers of the *AMERICAN LAW REVIEW*, and that such bill may be passed by the next Senate.

Yours truly,

S. P. JONES.

MARSHALL, TEXAS.

### SILVER CERTIFICATES NOT LEGAL TENDER.

*To the Editors of the American Law Review:*

In the last November-December number of the *AMERICAN LAW REVIEW*, page 907, "Notes," your editorial on "Validity of Contracts Payable in Gold," states in the closing lines that "gold certificates are not legal tender at all, while silver certificates are." Is not this statement a mistake? My understanding is that neither are legal tender. The act of February 28th, 1878, authorizing the issuance, states that "said silver certificates shall be receivable for customs taxes, and all public dues, and when so received may be reissued." This I do not understand, makes them legal tender, while it does in practical effect make them equal in value to any legal tender money. Attorney-Gen. Olney does not consider them "*lawful money*" within the meaning of section 4, Act of June 20th, 1874. See his official letter on this subject issued from the Department of Justice of date February 20th, 1894. Please do me the kindness to inform me if I have overlooked any part of the law.

Yours truly,

G. W. HARDY.

CORSICANA, TEXAS.

[You are right. The *treasury notes* issued in the purchase of silver bullion under the Sherman Act of 1890<sup>1</sup> are legal tenders; but the silver certificates issued under the Bland-Allison Act of 1878, are not, though they are receivable for all government dues.—Eds. *AM. LAW REV.*]

### MISSOURI DOCTRINE AS TO PAROL EVIDENCE UNDER THE STATUTE OF FRAUDS.

*To the Editors of the American Law Review:*

In my article on Parol Evidence in the last number of the *REVIEW*, reference was made, at page 870, to *Ellis v. Bray*,<sup>2</sup> and I took occasion to doubt the soundness of the doctrine there laid down. Judge Gantt now writes me that

<sup>1</sup> 26 U. S. St. 289, § 2.

<sup>2</sup> 79 Mo. 227.

that doctrine was repudiated in *Ringer v. Holtzclaw*,<sup>1</sup> in which the court, through him, expressed the opinion that the cases of *O'Neil v. Crain*,<sup>2</sup> and *Lash v. Parlin*<sup>3</sup> (on which *Ellis v. Bray* is founded), overlooked the distinction between common-law contracts and contracts under the Statute of Frauds, in respect to the admission of parol evidence. Judge Gantt also says "this court has since approved my views on several occasions." I am glad to have my opinion thus authoritatively approved.

IRVING BROWNE.

BUFFALO, Dec. 26, 1896.

<sup>1</sup> 112 Mo. 519.

<sup>2</sup> 67 Mo. 250.

<sup>3</sup> 78 Mo. 391.



## BOOK REVIEWS.

**RULING CASES. VOL. IX.**—*Ruling Cases.* Arranged, Annotated and Edited by ROBERT CAMPBELL, M. A., of Lincoln's Inn, Barrister-at-Law, Advocate of the Scotch Bar, and late Fellow of Trinity Hall, Cambridge, Assisted by other members of the Bar. With American Notes by IRVING BROWNE, formerly editor of the American Reports and the Albany Law Journal. Vol. IX. Defamation — Dramatic and Musical Copyright. London: Stevens and Sons, limited. Boston, U. S. A.: The Boston Book Co., Law Publishers and Booksellers. 1896.

This volume opens with seventeen cases, which, with notes to the same, occupy about two hundred pages, upon the interesting topic of *Libel and Slander*. The subject is divided into nine sections: Distinction between Libel and Slander; Publication; Privilege; Pleadings and Evidence in support of Action; Defense and Justification; Province of Judge and Jury; Slander of Goods of Rival Trader; Slander of Title; Criminal Proceedings.

The notes refer to many cases and present a good summary of the law of the subject. Some of them are quite long; as for instance the notes to the section upon Privilege occupy sixteen pages, which are about equally divided between the English and American editors.

The subject of *Demurrage* which is of interest to the Admiralty lawyer, is presented in eighty pages of cases and notes.

The title *Deposit* means deposit of property for safe-keeping, and the rule is stated that one receiving such a deposit gratuitously is not responsible for any higher degree of care than a prudent man would take of his own property. The rule is supported by a note of one page by the English editor and a note of three pages by Mr. Browne.

*Descent* and *Detinue* are titles of a few pages each which are largely taken up by notes.

*Devastavit*, or waste of assets by an executor or administrator through his negligence, is a short title with ample notes by the editors.

*Deviation* from the true course of an insured voyage occupies seventy pages and the notes of both editors are full and adequate.

*Dilapidations* is a title of nearly a hundred pages with fourteen leading cases. The first case relating to Dilapidations ecclesiastical is without interest in this country; but the other cases and notes relating to the liability of tenants for years, for life, in tail and mortgages in possession, to keep the property in repair are of a very practical nature.

*Discovery* is an equitable remedy that is nearly obsolete in this country, though some of the principles of this title have been adopted in other equitable proceedings.

*Distress* is not obsolete, unfortunately. It is illustrated in ten leading cases and several ample notes.

*Distribution* is a short title.

*Dog* is a title consisting almost wholly of an interesting note by the genial

American editor, who seems to have a liking for all well-mannered animals. He says that "on the whole, the dog is much less tenderly treated by the judiciary of this country than in England. \* \* \* The law looks tenderly on women and children who meddle with dogs. So it was held not conclusively negligent when an infant of thirteen struck a dog;<sup>1</sup> or meddled with a whip in a vehicle in charge of which the dog was left;<sup>2</sup> and when a woman spoke to a dog without an introduction;<sup>3</sup> or offered one candy."<sup>4</sup>

*Domicil*, which is something every one wants, is treated in a hundred and twenty pages with full notes of the English and American law.

*Donatio Mortis Causâ* is an interesting title with a good note by Mr. Browne referring to the American cases.

*Dramatic and Musical Copyright* is the last title in this volume, and is of limited interest to the profession in general, though of special interest to a few.

This volume contains nine hundred and thirty-eight pages in all. There are cited about fifteen hundred English and nine hundred American cases. The editorial work is kept up to the standard of the earlier volumes, if it is not higher. It, at any rate, seems to be all that could be asked for. The volumes of this series are beautifully printed on excellent paper by the University Press at Cambridge, Massachusetts.

OHIO STATE BAR ASSOCIATION REPORTS. Vol. XVII. Proceedings of the Annual Meeting of the Association held at Put-In-Bay, July 15, 16 and 17, 1896. Constitution, By-Laws, List of Officers, Members, etc. Columbus, Ohio: The Berlin Printing Company. 1896. pp. 252.

This association has upwards of four hundred members, and the secretary says it is much more of an influential factor in the State than is generally believed; and he enumerates as recent practical results of movements inaugurated and promoted by the association: "The extension of the course of study for admission to the bar; the enlargement of the State House to provide facilities for the Supreme Court; the adoption of the Torren's System of Real Estate Records." The address of Hon. John F. Follett, Senior Vice-President acting in place of John J. Wall, Esq., the President, on account of his illness, was upon *The Judiciary* with special reference to Ohio. We quote one paragraph: "No State in the Union can be more justly proud of her Supreme Court for the great learning and ability of its members and for the correctness and legal profundity of its opinions than the State of Massachusetts. With only about three-fifths the population of Ohio, the State of Massachusetts has seven judges of the Supreme Court, who are appointed during good behavior and receive salaries of \$6,000 each, except the chief justice, whose salary is \$6,500, and are each allowed \$500 annually for traveling expenses. They are not required to bow the knee to the political boss, nor pay campaign assessments to obtain their seats, and once obtained they are not required to do the bidding of any one in order to retain their positions. We may never be able to depart from the elective system in the selection of our judges of the Supreme Court, but we ought to be able to greatly improve upon that system as it now exists in this State."

<sup>1</sup> Plumley v. Birge, 124 Mass. 57.

<sup>2</sup> Meibus v. Dodge, 33 Wis. 300, 20 Am.

Rep. 6.

<sup>3</sup> Searles v. Ladd, 123 Mass. 580.

<sup>4</sup> Lynch v. McNally, 73 New York, 247.

Hon. George K. Nash delivered an interesting address upon the "Life and Character of Judge Allen G. Thurman.

Hon. John Randolph Tucker of Virginia delivered a learned address on "The Constitution of the United States — The Best Product of Political Science for the Security to Man." The subject is one upon which Mr. Tucker has bestowed much thought and he spoke with marked force.

James P. Wilson, Esq., read a paper upon the Choice of the Forum in which he chiefly discussed the interesting question, where and under what law should actions for personal injury, arising from negligence, be tried. He says: "Ohio is a good place to bring a damage suit."

The volume closes with memorials of several deceased members.

**POLLOCK'S FIRST BOOK OF JURISPRUDENCE.** — A First Book of Jurisprudence, for students of the Common Law, by Sir FREDERICK POLLOCK, Bart., Corpus Christi Professor of Jurisprudence at the University of Oxford, etc., etc. Macmillan & Co., London and New York. 1898. 12mo, pp. xvi, 348.

This volume is not intended as a treatise on jurisprudence; "it is addressed to readers who have laid the foundation of a liberal education and are beginning the special study of law." It comprises two parts, one dealing with "Some General Legal Notions," the other with "Legal Authorities and their Use." The chapter headings of the first part are: The Nature and Meaning of Law; Justice According to Law; The Subject-matter of Law; Divisions of Law; Persons; Things, Events and Acts; Relation of Persons to Things, (including) Possession and Ownership; Claims of Persons on Persons, (including) Relation of Obligations to Property. The chapter headings of the second part (a trifle more than a third of the book) are: The Express Forms of Law; The Sources of English Law; Sovereignty in English Law; Custom in English Law; Law Reports; Case-Law and Precedents; Ancient and Modern Statutes.

The first part deals, as the headings will indicate, with the material which we are fond of speaking of as "jurisprudence;" though the combination of the two parts in one volume and the use of English illustrations in the first part are intended, as the author neatly puts it, "as a protest against the habit of regarding 'jurisprudence' as something associated with a little knowledge of the laws of every country but one's own." Of the material in this part there is here no space to speak in detail. The learned and witty editor of the *Law Quarterly Review* is always suggestive and keen, and his utterances in this his new field of work are of the greatest interest to the profession. His presentation of the fundamental notions of jurisprudence is in many respects novel; and although his treatment is here necessarily elementary and incomplete, it takes its place with the few weighty contributions of Anglo-American writers to this subject. So far as concerns the avowed purpose of the present volume, however, we confess to a very small trust in the usefulness of the first part of the work, an opinion founded on the general inutility of any study of the abstract notions of jurisprudence by the beginner, whether they are disguised under the name of "jurisprudence," or of "elementary law," or of any other name. The orthodox method of the study of the law, to be sure — if we may concede to be orthodox a practice followed by the greater number of our law schools, is to take the beginner through a course of "elementary law," the

material of which includes the necessarily general notions, law, right, acts, persons, things, etc., as well as the abstract and general aspects of those doctrines, agency, contract, ownership, etc., which find concrete application in judicial decisions. For dealing with these general notions we believe that the beginner is quite incompetent, and for occupying his time profitably we believe that such a course or book is useless. He is incompetent, because he cannot appreciate the difficulties and the arguments that have led to the generalizations he deals with, and because he has as yet no notion of the concrete situations in which alone the generalizations have real significance. He cannot, for example, see the bearing of the discussion in the present book (page 45) on the "external standard" of conduct, until he is familiar with the doctrines of "acting at peril," the reasonable-man standard in negligence, etc., and with the various confused forms in which courts have struggled to express or declined to accept the underlying notion which is the subject of the abstract discussion in the book. Such work, moreover, is for the beginner useless, because it leaves him usually with a mere mass of words and uncomprehended generalities; and it is perhaps worse than useless so far as, in the absence of a mature power of criticism, it obliges him to be content with the results of his author or lecturer in the shape of dogmas to be memorized, and thus stunts that faculty of independent and versatile judgment which is the particular crown of the Anglo-American lawyer, and which ought to be cultivated in him at the earliest possible moment. The work has simply to be done over again at the end of his course, when he takes up the study of jurisprudence, well-equipped with the data which the jurist himself has all along assumed to build upon, and matured by training into a more or less independent and competent critic of legal notions. In short, the only proper place for such a study is at the end of a course of legal training; and at that point it may quite as well deal with the subject in its most advanced form.

This is not saying that the beginner should not be helped at the very outset by some mapping out of the general grouping of the subjects before him, some explanation of the reason why there are such different subjects as Contracts, Property, etc., for him to take up; but this comes as a mere concession to his helpless situation, not a distinct contribution to his knowledge; it can be done in two or three lectures, and more or less concretely, and is a very different thing from leading him through an entire course or book of legal explanations and discussions which, the more elementary they appear to us, are apt to be the more meaningless to him. After all, a good deal of our error seems to rest on a purely verbal fallacy; for though "elementary" things are usually both fundamental (in the science) and easy (for our comprehension), they may be the one without being the other; and in some departments, notably law and mathematics, the fundamental assumptions of the science are precisely those which we can most profitably postpone for ultimate study.

The second part of the volume serves a very different purpose. Some such material as this ought to be laid before the student at the earliest moment of his course, — just as the student of bookkeeping needs to know at the outset the difference between cash book, journal, and ledger; and yet this necessary material is just that to which least attention is given in the books of so-called "elementary law." In the chapters in the first volume of Chancellor Kent's Commentaries, and in one or two books such as Professor Wambaugh's Study

of Cases, different parts of this material are to be found; but the exposition of Sir F. Pollock is in some respects preferable, and is in any case a valuable addition to the available aids of this sort.

J. H. W.

**THE WORKS OF JAMES WILSON, Associate Justice of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia. Being his Public Discourses upon Jurisprudence and Political Science, including Lectures as Professor of Law, 1790-2. Edited by JAMES DEWITT ANDREWS. 2 Vols. Callaghan & Co., Chicago. 1896.**

The name of James Wilson is almost unknown to the present generation. His merits have received generous recognition at the hands of writers on the Constitutional History of the United States; but his popular fame has been eclipsed by that of many of his contemporaries, who were immeasurably his inferiors in learning and influence. It is undoubtedly true that Wilson was one of the great creative influences of the period when this government was formed, and was recognized as such by his own generation. But his early death removed him from the political arena, and new men and new events soon occupied the public mind. Some of his leading contemporaries in the Constitutional Convention remained in active life for a generation after Wilson had passed away, and gathered around them a following, who were interested in extending and recording the fame of their leaders. But Wilson found no biographer until he had been almost forgotten by the general public.

The fame of Wilson was very great in his own day. Washington called him "as bold, candid and honest a member as was in the Convention." Mr. Curtis in his Constitutional History names Washington, Hamilton, Madison, Franklin, King, Pinckney, Wilson and Randolph, as "the most important members of the convention, and those who exercised the highest influence upon its decisions." Wilson he calls a "wise, excellent and able man, \* \* \* one of the first jurists of America during the latter part of the last century." He says of his work in the Pennsylvania Convention: "His speech in that body is one of the most comprehensive and luminous commentaries on the constitution that has come down to us from that period. It drew from Washington a high encomium, and it gained the vote of Pennsylvania for the new government against the captivating and ingenious objections of its opponents."

Not even Hamilton was more thoroughly imbued with the desire for a strong, efficient system of government. And yet, in the days of the triumph of the idea of nationality, no popular fame has come to its early advocate and champion. A recent writer, whose theories belong to the *ante-bellum* period, centers his criticism upon Wilson and says: "His ought now, of all names, to be the most revered; for Story, Webster, Lincoln and all the lesser lights have done no more than reiterate his assertions, accept his premises, and repeat his language."<sup>1</sup>

Professor Bryce refers to the fact that Wilson was the first American statesman to recognize the true nature of the English constitution, and calls him "one of the luminaries of his time, to whom subsequent generations of Americans have failed to do justice." He places him "in the front rank of the political thinkers of his age," and classes him with Hamilton in intellect and influence.

<sup>1</sup> Clauson, *Seven Conventions*, p. 33.

The recent publication of a new edition of the works of Mr. Justice Wilson has called attention to his early reputation, and will probably tend to fix his place in American history.

Wilson was a native of Scotland, born September 14th, 1742, educated at Glasgow, St. Andrews' and Edinburg. His early education, like that of so many of the early American statesmen, was of the best. He was distinguished by his knowledge of the classics, and his familiarity with history. At the age of twenty-one he emigrated to New York, but soon after settled at Philadelphia, and became a tutor in the College of Philadelphia. He studied law in the office of that other almost forgotten revolutionary worthy, John Dickinson, and after brief periods of practice at Reading, Carlisle, and Annapolis, became a member of the Philadelphia bar. Here he rose to distinction, and became famous as an advocate. Washington sent his nephew from Virginia to become a student in the office of the famous lawyer. The mob stormed his house because he had courageously braved public opinion, and defended certain patriots "persecuted" in the courts, for violating the laws.

Such a man, as a matter of course, became active in the contest between the colonies and the mother country. He became a member of the Continental Congress, and served six years in that body prior to the meeting of the convention in 1787. He was active and efficient, and saw with a clearness of vision that was remarkable, the true legal basis of the position of the colonies. Like Hamilton, Wilson was of foreign birth, and thus free from that exaggerated respect and affection for a particular colony, which rendered many other strong men more or less inefficient in the work of creating a national government. He early developed the idea of nationality, and contended that the contest with Great Britain was being carried on by one united community, consisting of the people of the thirteen colonies.

Wilson's reputation as an advocate and orator was very great. But his permanent fame must rest upon his work as a member of the Constitutional Convention, and of the Pennsylvania Convention called to ratify the results of its deliberations.

After the new Constitution went into effect, he became a member of the Federalist party. President Washington, recognizing his merits as a lawyer, appointed him a Justice of the Supreme Court of the United States. As a member of this body his record is creditable, although his term of service was too short to admit of his establishing any great judicial reputation. It is doubtful whether Wilson had the qualities of a great judge. He was a statesman and a political philosopher of the first rank, and was the first American who was entitled to be called a jurist. His decision in *Griswold v. Georgia* is the work of a statesman and political philosopher, but in my judgment does not compare in lawyer-like qualities with the dissenting opinion delivered by Mr. Justice Iredell, in the same case.

In 1790 the law department of the college of Philadelphia was established, and Wilson was elected the first professor. The first course of lectures to students of law ever delivered in an American law school was delivered during the winter of 1790-1 under auspices the most favorable. They seem to have been attended by about everyone of importance in the capital, from President Washington to "citizens of mark and influence."

The course was continued throughout the winters of 1790, 1791-2, but as

never completed. After the union of the College of Philadelphia with the University of Pennsylvania, a law professorship was created in the new institution, and Justice Wilson elected to the position. Various causes, however, contributed to the abandonment of the project. It is probable that the anticipations of the public had been raised too high, and that the number of students proved inadequate to the financial success of the enterprise. It is interesting to note that Wilson placed a very high value upon his services, and was in the habit of charging a much larger sum for the privileges of a student in his office than other prominent members of the bar. Doubtless at his instigation the trustees of the college passed a resolution to the effect that each student who attended his lectures, should not be required to pay over ten guineas.

The labors of the Supreme Court were not burdensome, and Wilson found time to prepare his lectures for publication. In 1791 he was selected by the Assembly of Pennsylvania to revise and digest the laws of the commonwealth; but the consent of both branches of the legislature had not been obtained, and when it became necessary to provide money to pay the expenses of the enterprise, it was not forthcoming, and the project had to be abandoned.

At the time of his death Wilson had in course of preparation commentaries on the Constitution of the United States and of Pennsylvania, and a report of the Criminal Law, all of which were unfinished.

When Wilson became a member of the Constitutional Convention his mind had reached its maturity. He was one of the ripest scholars and deepest political thinkers of the day. He entered the convention with the clearly defined purpose of contributing to the creation of a government which should be truly national in its objects and its powers. The same writer quoted above says: "Wilson, the earliest of those who contended that United States does not mean States united, and that union does mean a nation, was a man of great capacity. He had a fixed idea, proof against facts, and even his own inconsistency. During the belief in witchcraft, 'possessed' was the word used to express the demon influence beyond control, when once accepted. He was possessed by the idea that the states were, or should be considered politically, as imaginary beings, *jure divino* rulers, as realities."

The old confederation was a Federal league, and the people had elected delegates charged with the duty of revising and amending the articles of confederation. But Wilson and his associates boldly assumed the responsibility of violating their instructions for the good of the country. Assuming that "a national government should be established, consisting of a supreme legislative, executive and judiciary," they devoted all their great powers to the task of reconciling conflicting views and interests, and creating such a government. Their opponents started with the assumption that "every human being is born with a Pope in his belly," and struggled for a system which would so scatter power as to reduce the danger of usurpation of power to a minimum.

In the debates upon the great primary question which engaged the attention of the convention, Wilson planted himself squarely upon the principle of confidence in the people. Democracy was then in its infancy, and wise men doubted the policy of trusting the people with full powers of government. "The people do not want virtue," said Gerry, "but they are deceived by pretended patriots." Sherman thought that the people "should have as little to do as may be with the government. They want information and are liable to be

misled." But Wilson with broader wisdom replied: "Without the confidence of the people no government, least of all a republican government, can subsist." Replying to Pinckney's attempt to have the election of the members of the Lower House taken from the people and vested in the legislature, he said; "Vigorous authority should flow immediately from the source of all legitimate authority, the people \* \* \* Representation should be an exact transcript of the whole society. It is made necessary only because it is impossible for the people to act collectively." Later he said, "The election of the first branch by the people is not the corner-stone only, but the foundation of the fabric."

On Dickinson's motion that the members of the Senate should be elected by the State legislatures, Wilson said: "The States are in no danger of being devoured by the national government; I wish to keep them from devouring the national government. Their existence is made essential by the great extent of our country. I am for the election of the second branch by the people in large districts, subdividing the district only for the accommodation of voters."

The preliminary resolutions of Randolph provided for a national judiciary to be composed of a Supreme and one or more inferior courts. After this had been adopted, Rutledge sought to have the motion reconsidered, and a provision inserted abolishing the inferior courts, in order that causes should first be heard in the State courts. This was opposed by Dickinson, Madison and Wilson, who succeeded in leaving the question of the creation of inferior courts to the legislature.

In line with the general idea of securing a strong national government, Wilson advocated the appointment of judges by the executive instead of by the legislature, as provided for by the Virginia plan.

With reference to the election of the executive, Wilson said: "Chimerical as it may appear in theory, I am for election by the people. Experience in New York and Massachusetts shows that the election of the first magistrate by the people is both a convenient and a successful mode. The object of the choice in such cases must be persons whose merits have general recognition." He also favored a single executive, recognizing the truth since so well expressed by Mr. Froude, that "in a committee you get the united folly, not the united wisdom of the whole." "Unity in the executive," said Wilson, "will rather be the best safeguard against tyranny." \* \* \* "Executive questions have many sides, and of three members no two might agree." Of the proposed executive council, he said: "A council oftener covers malpractice than prevents it."

Space will not permit a full review of Wilson's work in the Constitutional Convention. It should, however, be noted that he fully recognized the fact that the ultimate control over legislation would rest with the judiciary; and expected the courts to exercise the power of declaring statutes unconstitutional. A careful study will show that he was closely identified with whatever is most characteristic of the system created. The opinions expressed and the influence exerted, fully justifies the high praise of Washington and other contemporaries and of such great constitutional writers as Curtis and Bancroft.

The first edition of Wilson's works was published a few years after his death, under the editorial supervision of his son. But for some reason his merits have been lost sight of by the general public, and are known only to



historical students, and to lawyers who have an unprofessional taste for "origins." This new edition is creditable to the editor and the publishers, and will do much toward reviving interest in a long neglected historical character. The editorial work is admirably done. The notes are learned, yet concise, and are not so numerous as to overburden the text.

The first volume contains the portions of the lectures actually delivered, with an appendix containing the famous speech delivered at the Constitutional Convention of Pennsylvania, and the no less remarkable argument on the power of the confederacy to incorporate the Bank of North America. It has been said that this speech in the Pennsylvania convention was the efficient cause of the adoption of the constitution by that body.

In the argument on the constitutionality of the Bank of North America, Wilson anticipated the arguments subsequently used in the line of great constitutional decisions ending with the legal tender cases. The bank was incorporated by the Congress of the Confederation in 1782. The question of its constitutionality being raised, Wilson published a pamphlet in which he developed the doctrine of implied power. But little has been added to his argument. It rested upon the two propositions: (1) For many purposes the United States are to be considered as one undivided, independent nation; and is possessed of all the rights and powers and properties by the law of nations inherent in such a nation. (2) Whenever an object occurs to the direction of which no particular State is competent, the management of it must of necessity belong to the United States in Congress assembled. Such being the character of the general government, it is, to quote the language of Mr. Justice Bradley, a "self-evident proposition that it is invested with these inherent and these implied powers, which at the time of the adoption of the constitution were considered to belong to every government as such, and as being essential to the exercise of its functions."

Wilson was probably the first to call attention to the fact that Blackstone's definition of law (as that which is prescribed by a superior, and which the inferior is bound to obey), is inconsistent with the theories of law and government, which are at the foundation of the American State. He denounced Blackstone as a logical enemy to republicanism, and his idea of law as containing the germ of divine right, — "a prerogative imperiously attempted to be established — of princes arbitrarily to rule; and of the corresponding obligation — a servitude tyrannically attempted to be imposed — on the people, implicitly to obey."

Blackstone's system knew not the people, while Wilson bases his political and legal philosophy upon the simple principle that the supreme or sovereign power resides in the people at large, who retain the right to abolish, alter or amend their constitution at any time and in any manner they deem expedient. This principle Blackstone pronounced a political chimera, existing only in the minds of theorists. But notwithstanding this, Blackstone's Commentaries became the foundation of legal education in America, while Wilson's lectures were forgotten.

The lectures treat of (1) The Law of Obligations; (2) The Law of Nature; (3) The Law of Nations; (4) Municipal Law; (5) Man as an Individual Abstractly Considered; (6) Man as a Member of Society; (7) Man as a Member of a Federation; (8) Man the Individual, as a Member of the Common-

wealth of Nations; (9) Of Government; (10) Comparison of the Constitution of the United States with that of Great Britain; (11) Of the Common Law; (12) Of the Nature and Philosophy of Evidence.

The second volume contains Parts Two and Three and an Appendix. In Part Two are discussed: (1) National and State Courts; (2) The Legislative Department; (3) The Executive Department; (4) The Judicial Department, Nature of Judicial Power; (5) Nature and Constitution of Courts; (6) Judges; (7) Juries; (8) Sheriffs and Coroners; (9) Attorneys and Counselors; (10) Constables; (11) Corporations; (12) Citizens and Aliens; (13) Natural Rights of Individuals.

Part Three treats of Crimes, the means of preventing offenses and bringing to trial and punishing offenders. The Appendix contains learned papers on the History of Property; the Nature and Extent of Legislative Authority; and the speech in the legislature of Pennsylvania, delivered in January, 1775.

The lectures, as a whole, are very learned and fully justify Willson's title to be called the most eminent American jurist of his day.

CHARLES B. ELLIOTT.

MINNEAPOLIS.

**RIVIER ON THE LAW OF NATIONS.**—*Principes Du Droit Des Gens*, par ALPHONSE RIVIER, Consul Général de la Confédération Suisse: Professeur à l'Université de Bruxelles; Professeur Honoraire à l'Université de Lausanne. Paris: Librairie Nouvelle de Droit et de Jurisprudence. Anthur Rousseau, Editeur. 14 Rue Soufflot et Rue Toullier, 13. 1896. 2 Volumes. pp. 586 et 501. Prix, 25 France.

This is what may be justly called a monumental work on International Law, written by a master in that high science. The author is a profound scholar, and a diplomat of considerable distinction in Europe. The *esprit* of the treatise is admirably combined of philosophic and practical; and the principles which are so clearly exposed, are fortified in every instance by the exemplification of every considerable case in diplomatic annals, such as treaties and State papers, where the principle stated has found practical application. The accepted tenets of the Law of Nations are asserted with a sort of pragmatic sanction, to use the term. Indeed, this is the professed purpose of the writer, to speak as "a man having authority," of the important branch of law treated. This he states in his preface, saying: "It is the ambition of this work to address itself particularly to political men, to diplomatists, to the members of governments and of parliaments; in fine, to all persons who occupy themselves in public affairs, and especially with international relations. My aim is less to foresee the innumerable questions which arise in practice or are debated in theory, than it is in a general way to solve them by means of the principles of law. I have endeavored to unravel these principles, to show the relations between them, their origin, the reasons for them. I have almost entirely abstained from polemics, but have set out what I hold to be assuredly the law, with my reasons; and only mention divergent opinions by way of exception."

There is a wealth of high conceptions regarding the law of nations, its nature and its sanctions. Small reference, within the limits of such a sketch, can be made to many points; but I shall quote a notable passage on the sanction of international law, which is much in advance of nearly every publicist, even of Lord Russell in his Saratoga speech, and is close

to the ideal of the future. Our author says: "The law of nations is a system of positive law, founded not upon simple abstractions, but upon facts. They are not principles of morals, nor of philosophy, nor of politics. They are veritable juridical principles, recognized as such, and consequently as obligatory, by the common conscience of the States which form the Society of Nations." And he adds: "In the science and the literature of the law of nations, the positivist tendency is a realistic tendency, seeking above all to establish this law materially and effectively in vigor, and recognizing its character as a veritable system of law, and consequently obligatory." He declares that "the law of nations is a positive law because the States wish it to be so. They recognize its obligatory force, — they proclaim it. No State, in any official act of our times, has ever dared to declare that it did not consider itself bound by the law of nations and its precepts."

I will make a few short quotations of his statement of the law bearing on several matters of present interest to the public. In an anterior article in this issue, I have cited our author on the subjects of belligerency and recognition. Of the Monroe doctrine he treats rather charily, introducing the matter by saying that "the intervention policy of the Holy Alliance provoked an important declaration from the fifth President of the United States, James Monroe, in his presidential message of September 2 (*sic*), 1823." He attributes the authorship of the doctrine to Mr. Adams, saying that Mr. Monroe "had his message of 1823 prepared (*fit rediger*, as he says) by the Secretary of State, John Quincy Adams." He then sets out a translation into French of the material parts of the message containing the Doctrine, and sums it up thus: "According to this declaration, the United States would not interfere in the affairs of European nations which had colonies in America; but they would no longer allow new States, recognized by them as independent, to be the butt of European attacks, and they would resist all interference of Europe on the American continent." And he says: "The Monroe Doctrine is a maxim or rule of conduct which had, in its origin, no value other than as an opinion or personal resolution of its responsible author, enounced in some sort *ex cathedra*. The successors of James Monroe have abided by it. \* \* \* But it has never been made the object of a convention, to which the non-American States have consented. It goes without saying that it would not have any sort of obligatory force upon Europe. Its principle is not at all part of the principles of the law of nations. The pretension made more than once by the United States to impose it more or less upon the European States, is bare of all judicial foundation. \* \* \* What is called the Monroe Doctrine to-day is in reality the affirmation of a permanent pretension of the United States to intervene in the affairs of all the other States of America."

On the question of Extradition, there is a remark that places the matter in a light which is new and not generally accepted; though no doubt, with proper exceptions, it is true and will become of more general acceptance. He says: "The obligation of extradition exists independently of all treaty agreements, between States of equal civilization, members of the international community. \* \* \* This principle is to-day more and more generally recognized, at least in theory. This recognition is of recent date; it supposes at once the existence of the juridical community among the States, the clear perception of this community, and an absolute mutual confidence. \* \* \* The ancient

rule not to deliver except in virtue of treaties is followed in Holland, England, the United States, France and Belgium; while Germany, Austria, Hungary and Switzerland observe the modern and more liberal practice."

The work treats exhaustively, in a perspicuous and pleasing style, every phase of the law of nations, as at present accepted. The notes give ample references to a select number of the most authoritative writers on the subject-matter; and the text is peculiarly rich in historic and diplomatic illustration of the principles stated, including citations and extracts from nearly every treaty of modern times. The customs, language and etiquette of diplomats and negotiations are treated interestingly; and, in fine, whatever is of authority or acceptance in the broad field of international relations is admirably treated in these volumes. It seems a pity that so valuable a work should be a sealed book to most American readers, being in a strange idiom; though in a language which for culture, *politesse* and expressibility is the chosen medium of the public affairs and the social intercourse of the cosmopolite world

JOSEPH WHEELS.

**MORTUARY LAW**, by SIDNEY PERLEY, of the Massachusetts Bar. Author of "The Law of Interest," "Massachusetts Adjudicated Forms," etc. Boston. Published by George B. Reed, Law Publisher. 1896. Large 12mo. Law sheep. 220 pages. Price, \$3.00.

This is a new title for a law book, and undoubtedly the first thought that the title will suggest in the minds of most readers will be, how did the author find cases enough in the reports to make a book off? Turning to the table of cases they will find, however, that four hundred or more cases are cited, and many of them are cited several times, and looking through the book they will find that nearly all of the cases are quite recent, as the dates of the decisions annexed to the citations show. The decisions, moreover, are nearly all American. This shows that the subject is of importance, and is of growing importance.

The author seems to have investigated every division and subdivision of which the subject is capable. There are thirty chapters in all. The first half of them, speaking in general, relate to the last sickness, death, inquest, custody and disposition of bodies, undertakers, funerals, funeral expenses, monuments, permits for transportation, burial and exhumation. Then there are fifteen chapters relating to cemeteries, the various kinds, the prohibition of their establishment and use, the acquirement of lands for, rules and regulations affecting, taxing, sale, mortgage and partition of the property, the care and conduct of them, the rights and liabilities of lot owners, and the abolition and abandonment of cemeteries are also considered as nuisances and as charities. Replevin and larceny are not forgotten in this connection. Finally we are told what courts have jurisdiction of these cheerful matters.

What suits may come  
When you have shuffled off this mortal coil  
Must give us pause.

Perhaps by knowing the law we may avoid some of these; and our representatives and their legal advisers, knowing the law, may avoid others, and secure for us by good title a few square feet of earth; or the final rest may be made more secure by fire and an immediate entrance into nature's healthy elements.

**CURTIS ON JURISDICTION OF THE UNITED STATES COURTS, SECOND EDITION.**—Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States. By BENJAMIN ROBBINS CURTIS, LL.D. *Second Edition.* Revised and enlarged by HENRY CHILDS MERWIN, author of "The Patentability of Inventions;" Edition of "Merwin on Equity and Equity Pleading," and Lecturer in the Law School of Boston University. Boston: Little, Brown, and Company. 1896. 12mo. Cloth, \$2.50 net; Law Sheep, \$3.00 net. pp. 341.

Mr. Merwin in his Preface says: "The changes in the Statutory Law of the Federal courts have been so great since the first edition of this book was published, that I have been obliged to omit a small part of it, and to add several new chapters and many new paragraphs. But my object has been—I need hardly say—to meddle as little as possible with the work of so great a lawyer and such a master of legal style as Judge Curtis. The notes to the first edition—with one or two exceptions—were added by the editors of that edition. Most of them have been preserved in the present edition, and the new notes are inclosed in brackets. And so as to the text;—my additions are inclosed in brackets, and all that part of it not so inclosed is the work of Judge Curtis, entirely unaltered."

It is now highly important that this work of a great judge, who knew more about the subject he lectured upon than any other man, should in a new edition be brought into harmony with the great changes made in the jurisdiction of the Federal courts by the creation of the Circuit Courts of Appeal; and also that the decisions affecting the jurisdiction of the Federal courts during the past sixteen years, which are many, should be noted. This work has been admirably done by Mr. Merwin, who was prepared for his task by much experience as a writer, as well as much learning as a lawyer. The additions he was obliged to make are both large and important and they are made with excellent good judgment. The work now presents the jurisdiction, practice and jurisprudence of the United States courts as it is to-day; and for students' use there is nothing else on the subject.

**HOWE'S STUDIES IN CIVIL LAW.**—Studies in the Civil Law and Its Relations to the Law of England and America. By WILLIAM WIRT HOWE, of the Bar of New Orleans, sometime a Justice of the Supreme Court of Louisiana, and W. L. STORRS, Professor of Municipal Law in Yale University for the year 1894. Boston: Little, Brown and Company. 12mo. Cloth, \$2.50 net; Law Sheep, \$3.00 net. pp. 340.

These lectures present the history and principles of the civil law in a condensed, but attractive form. The civil law has remained a sealed book to most common-law lawyers, in large part, we think, because it has generally been offered to them in bulk, as a statute,—the driest of all reading. Most common-law lawyers look upon the civil law as something wholly foreign to them, and something they care nothing about, and would not know anything about it if they could.

This is much more the case in America, excepting Louisiana, of course, than it is in England. There is in general very little appreciation of the extent to which the common-law, and particularly our equity jurisprudence, are indebted to the civil law for their principles. Judge Story in his works liked to quote freely from the civil law, but his readers have generally passed by all the learning he presented from this source with a feeling of impatience. The practicing lawyer, who did not study the civil law system as a part of his edu-

sation, does not want to know anything about it. It should be studied as a part of the ground-work of our law. Judge Howe quotes Lord Holt as saying: "It must be owned that the principles of our law are borrowed from the civil law, and therefore grounded on the same reason in many things;" and after quoting to like effect from Chief Justice Tindal, he says: "These two utterances from the English bench sum up, perhaps, the whole subject. As Lord Holt perceived, as a matter of history, many of the leading principles of English law came from Roman sources. And, as Chief Justice Tindal pointed out, while the Roman Law as a system is not binding in England, nor in the common-law States of our Union, it is yet a perpetual fountain of juristic wisdom; it is a treasure-house of principles as persistently true as the propositions of Euclid; and its study as a matter of comparative jurisprudence must be of the highest educational value."

Judge Howe presents the subject in a most agreeable manner. Those who had the good fortune to hear him deliver these lectures must have been inspired by his eloquence with a love of the subject. His education and experience fitted him to be a teacher in the civil law having a complete mastery of the subject. Grounded and learned in the common law, he became a student and practitioner of the civil law in Louisiana and administered the law in that State as a justice of the Supreme Court.

We venture to make one suggestion, and that is that the fourteenth lecture, that upon Louisiana and Judge Martin, should not be included in the body of the book, but should be made a part of the appendix. The lecture relates to the history of Louisiana and the biography of Judge Martin. Incidentally it accounts for the introduction of the civil law into that State and for its development there. But the symmetry of the book is marred by giving this lecture the place it occupies.

**BIGELOW ON TORTS, SIXTH EDITION.**—Elements of the Law of Torts for the Use of Students. By MELVILLE M. BIGELOW, Ph. D., LL.D. *Sixth Edition.* Boston: Little, Brown, and Company. 1896. 12mo. Cloth, \$2.50 net; Law Sheep, \$3.00 net. pp. 416.

Dr. Bigelow in his preface to this edition says: "This work now begins for the first time, with a 'general doctrine,' or general theory, of the law of torts. What follows—all that has heretofore appeared—is an unfolding of the doctrine as seen in the 'Specific Torts' of the law; the specific torts being classified according to what are taken to be the primary forces, or 'Elements' of liability, to wit, 1, fraud or malice as means or motive to conduct; 2, intention considered without regard to means or motive; 3, negligence.<sup>1</sup> It must not be supposed that the present work is intended to suggest any method of study or teaching; it deals only with the rules of law, as the aim of theory in the general scheme of relations intended to bind men together in the State."

The preliminary statement of the general doctrine of torts is a very important addition to the author's well-known and much-used book. This is a scientific statement in general of the domain of tort, and of the rights that are within domain; of the privileges which import a defense from liability for torts; of the law as affected by the special relations of persons or by their

<sup>1</sup> "In other words, the question is, what and how liability arises, 1, from intention

plus fraud or malice; 2, from intention alone; 3, without intention."

incapacity; of legal cause—and contributory fault; of the termination of liability; and of the effect of the death of plaintiff or defendant.

The number of cases cited is largely increased over the number of previous editions.

It is quite superfluous to speak in general of this work, which is so well known and so highly approved everywhere.

**BUMP ON FRAUDULENT CONVEYANCES, FOURTH EDITION.**—A Treatise upon Conveyances made by Debtors to Defraud Creditors. By ORLANDO F. BUMP. Revised and Enlarged, with References to all American and English Cases, by JAMES MOLLVAIN GRAY. *Fourth Edition.* Washington, D. C. W. H. Lowdermilk & Co., Law Publishers and Booksellers. 1896.

The principal literary characteristic of the late Mr. Bump was the stating in terse language of propositions of law deducible from the cases, without much amplification or comment, but with an apt and convenient grouping. His works were hence frequently called *digests* by those who forgot that an accurate digest of what the courts have really held is, after all, the most useful law book. The present reviser seems to have carried out the plan of the lamented author in an excellent manner. In fact, he has done it so well that no one can tell, from the appearance of these pages, where Bump ends and Gray begins. The work reads smoothly throughout. We have had occasion to examine it with reference to several different topics, and have always found the cases accurately cited; and we have found cases with the aid of this work that we have not been able to find with any other aid. We therefore believe that the editor is justified in stating that the citation of authorities is more nearly complete than in any other work on this topic. Something more than 8,000 cases are cited. With a text of little more than 600 pages, this does not leave space to give much attention to each case; but it must be remembered that, on nearly every topic of the law, the mass of adjudged cases is now so great that the most painstaking author can do no more with many of them than cite them to the leading propositions which they decide or apply. This work is well printed, and we have no hesitation in recommending it to the profession.

**WILL ON CIRCUMSTANTIAL EVIDENCE.**—A treatise on the Law of Circumstantial Evidence, illustrated by Numerous Cases. By ARTHUR P. WILL, of the Chicago Bar. Philadelphia: T. & J. W. Johnson & Co. 1896.

The label on the back of this book reads "Will's Circumstantial Evidence." A distinguished lawyer picked up this volume from our table, and said that it was one of the best law books that ever was written. He confused it with the work of Mr. William Wills, which work the present author has thought it wisest to follow in its main divisions, preserving much of what is valuable in its scientific discussion concerning the phenomena on which the rules of circumstantial evidence are based,—as he states in his preface. To avoid this confusion, the publishers should have labeled the book "Will on Circumstantial Evidence."

The leading idea of what is called circumstantial evidence is the proof of facts by circumstances in the absence of eye-witnesses. If this definition is correct, a considerable portion of this treatise does not relate to circumstantial

evidence at all. The accused himself is an eye-witness, in the sense of knowing from his memory and conscience whether or not he committed the crime with which he is charged. His confessions and admissions therefore form no part of that body of evidence which is called circumstantial evidence; and yet we have a chapter in this work on confessional evidence. The subject of expert or opinion evidence is another branch of the law of evidence which is in no sense a branch of what is called circumstantial evidence, and yet there is a chapter on that subject in this work; and, as it is but a single chapter on a subject on which volumes have been written, it is necessarily incomplete, though not without value. The subject of the proof of handwriting by comparison does not seem to be a branch of circumstantial evidence, though it is indirect evidence; and yet it is treated of in this work at some length.

This work, after some preliminary chapters of a general nature, treats of the characteristics of circumstantial evidence; presumptions; relative value of direct and circumstantial evidence; sources of circumstantial evidence; motives to crime; the evidence of the declarations and acts indicative thereof, including threats, evidence of previous attempts and other crimes; preparation and opportunity for the commission of crime; recent possession of the fruits of crime; unexplained appearances of suspicion, and attempts to account for them by false representations; the suppression, destruction and fabrication of evidence; identification of person; identification of articles of property; verification of dates and time; the presumption of innocence; the credibility of testimony; the conduct of the complaining party as giving rise to the presumption of innocence; the conduct of the accused as raising a presumption of innocence; the effect of the absence of apparent motive to commit the crime; declarations and threats of the deceased; the explanation of unfavorable circumstances; evidence of character; the defense of alibi. Then there are several chapters relating to rules of induction specially to be observed in cases of circumstantial evidence. These are followed by several chapters relating to the proof of the *corpus delicti*; and the whole work is concluded by four chapters relating to the force and effect of circumstantial evidence.

We have looked into this book with sufficient attention to be able to say that the text is intelligently written, that the statements therein are apparently borne out by the authorities, that the authorities cited by the learned author are numerous and many of them recent, and that it is on the whole a good and acceptable work on the subject of which it treats. It is well printed.

**AMERICAN STATE REPORTS, VOLS. 49 AND 50.**—The American State Reports, Containing the Cases of General Value and Authority, Subsequent to those Contained in the "American Decisions" and the "American Reports," decided in the Courts of Last Resort of the Several States. Selected, Reported, and Annotated by A. C. FREEMAN and the Associate Editors of the American Decisions. Vols. XLIX and L. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1896.

The new typographical dress in which these volumes are printed will arrest the attention of the reader. The italics and bold-faced type, which in former volumes served to facilitate search, have now disappeared, and in the captions and so-called sideheads, thin-faced capital letters have taken their place; whilst the italics have disappeared from the numerous notes, leaving it like a barren California plain in August, when the grass is all dried up. Whether it be



an evidence of the hard times through which we have been passing, or of a desire on the part of the publishers to keep abreast of the times, or a pardonable desire on their part to make as large a profit out of their subscribers as possible, — it is plain that the *linotype* has got in its economical work on these two last volumes; but whether in the way of improving the dress of the work there will perhaps be a difference of opinion. Certainly, the type now used is new and clean, and in this respect the pages look better than did the pages of the preceding volumes. If this change is ascribable to three years of hard and rigorous times for business men, it is gratifying to know that it is not accompanied with any diminution of editorial care and skill. The same copious notes are found as in previous volumes, and these notes are devoted to important living questions in the law. Nor has there been any diminution in the number of pages. Each volume still carries about 1050 pages. The usefulness of this publication need not be suggested to lawyers who are so fortunate as to possess it. Those who are not thus fortunate, if they knew what they are missing, would be hankering after it, just as the Pope would have been hankering after Father Tom's poteen, if he had known what it was.

**CHURCH'S DIGEST OF THE AMERICAN STATE REPORTS, FROM VOL. 25 TO 48.**—A Digest of the Decisions of the Courts of Last Resort of the Several States, from the Year 1892 to the Year 1896, Contained in the American State Reports, Volume 25 to 48 inclusive, and of the Notes therein Contained, to which is Prefixed an Alphabetical Index to the Notes. By W. S. CHURCH. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1896.

Mr. Church is known to the profession as an author of some excellent legal works, and he has been for several years one of the editors of the American State Reports. He has produced what seems to be in all respects a good digest. The cross-references are numerous, and direct the searcher to the very paragraph where the intended matter is found. The titles are numerous and aptly selected. The paragraphs are assumed to be the same as the syllabi of the American State Reports, but they have been drawn with care. There is a very copious index to the notes in the volumes of the American State Reports which are here digested. There is also a table of all the cases published in full in the same volumes. How the publishers came to allow this table of cases to be made and printed in the present work in large type we do not know, in view of their well-known antipathy to tables of cases.

**ELLIOTT ON PRIVATE CORPORATIONS, SECOND EDITION.**—The Principles of the Law of Private Corporations. With Leading and Illustrative Cases. By CHARLES B. ELLIOTT, Ph. D., LL.D., a Judge of the District Court of Minnesota and Head of the Department of Corporation and International Law in the College of Law of the University of Minnesota. Second Edition. Minneapolis: The Goodyear Book Co. 1896.

This is a volume of a little over 600 pages of ordinary law type and size. It is intended primarily for students, and consists of two parts: one part which may be called a treatise, and another which consists of a collection of cases printed after the Langdell plan, without head notes, the student being expected to dig into each case and tell what it decides without the aid of the reporter. It seems to us that it is a good book of the kind. The author is a learned lawyer, a scholar, and a thinker. He has been in times past an occasional con-

tributor to the *AMERICAN LAW REVIEW*, and he has an article in this department of our present number.

There is a difference of opinion upon the question whether books specially prepared for students are the most valuable to them. Some instructors in the law are of opinion that the best book to place in the hands of the student is the very book that you would place in the hands of the judge or on the shelf of the practitioner; and we are of that opinion. Others go on the milk-for-babes principle; though it ought to be fairly stated that this is not a book of that kind. It would be difficult to draw any distinction in style or in mode of explanation between the text of this book and the text which a good lawyer would construct if he were writing a treatise on the same subject for use by his professional brethren. Without time to give it more than a hasty examination, it impresses us as likely to lead the student into a knowledge of the leading doctrines relating to the law of private corporations, as they are settled and unsettled in the United States.

**HARDWICKE'S HISTORY OF ORATORY AND ORATORS.**—History of Oratory and Orators: A study of the Influence of Oratory upon Politics and Literature, with Special Reference to Certain Orators Selected as Representative of the Several Epochs, from the Earliest Dawn of Grecian Civilization down to the Present Day. By HENRY HARDWICKE, Member of the New York Bar, the New York Historical Society, etc. New York and London: G. P. Putnam's Sons. 1896.

This is too good a book to be reviewed merely: we are going to read it.

**WILLIAM PENN'S PLAN FOR THE PEACE OF EUROPE.**—This celebrated document is reprinted by the directors of the Old South Work, at Old South Meeting House, Boston, Mass. It embraces a pamphlet of 19 printed pages, and is given to us with the quaint spelling and capitalization of the days of William Penn. We understand that "the Directors of the Old South Work" is an association whose aim is to rescue from oblivion the monuments of the early colonial history of our country. Their labors ought to have something more than a curious interest for that class who have the leisure and the inclination for historical inquiry and research, if we may judge from the following list of their publications:—

1. Early Massachusetts History.
2. Representative Men in Boston History.
3. The War for the Union.
4. The War for Independence.
5. The Birth of the Nation.
6. The Story of the Centuries.
7. America and France.
8. The American Indians.
9. The New Birth of the World.
10. The Discovery of America.
11. The Opening of the West.
12. The Founders of New England.
13. The Puritans in Old England.
14. The American Historians.

**MILLER ON THE LAW OF NATURE AND NATIONS.**—The Law of Nature and Nations in Scotland: being the Lectures delivered in Session 1895-96 in the University of Glasgow, introductory to the Three Courses of (1) Philosophy of Law, General and Comparative Jurisprudence, (2) the Law of Nations, or Public International Law, and (3) International Private Law. By **WILLIAM GALBRAITH MILLER, M. A., LL.B.** Advocate. Edinburgh: William Green & Sons, Law Publishers. 1896.

These three essays, beautifully printed on clear toned paper with large and clear type, are altogether too attractive to be passed hastily through the reviewer's crucible. We are going to read them carefully, not merely for the purpose of writing a future notice, but for the literary treat which a hurried examination leads us to anticipate.





Harvey B. Sturds,

# THE AMERICAN LAW REVIEW.

MARCH-APRIL, 1897.

## THE PRESENT STATE OF THE LAW.

After the death of Bacon there ensued a period of two hundred years, during which the spirit of Coke lay heavy on the law, and during which no one ever so much as mentioned the name of law reform. Scientific men stole the ideas of Bacon with remorse, without a knowledge of any real lawyers disbelieved him because he had shown in words which they were disgusted to read. But when Blackstone had written his study of the legal outline of England, Bentham found his ideal plan of law. When the discussion on the reform of 1832 added some rays of light into the darkness of the old English law, the mastodons began to lose their vitality and to dismember, as insurgents like Mun, Langbe, Mackintosh, Romilly and others took up the task where Bacon had left off. They were often unprevailing, but with occasional victories they have made one at present disputes. Time would fail me to speak in a manner in which the warfare has been carried on by them, others in our own country. But the contest between the old and the new is still undecided.

The concluding portion of the address delivered by Mr. Rose, of Arkansas, at the meeting of the Virginia Bar Association at Parkersburg, West Virginia, in 1896. The address was published in the *Am. Law Rev.*, LXXVI, 11.

The former portion of it was published in our last number (*Am. Law Rev.*, LXXV, 11) under the title "Coke and Bacon: The Conservative Lawyer and the Law Reformer." *Eds. Am. Law Rev.*



Harvey B. Stone

# THE AMERICAN LAW REVIEW.

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MARCH-APRIL, 1897.

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## THE PRESENT STATE OF THE LAW.<sup>1</sup>

After the death of Bacon there ensued a period of two hundred years, during which the spirit of Coke lay heavy on tower and tree, and during which no one even so much as mentioned the name of law reform. Scientific men stole the ideas of Bacon without remorse, without acknowledgment; and lawyers discredited him because he had shone in fields which they were disqualified to enter. But when Blackstone had presented his stately and classical outline of English law Bentham fired his signal gun of revolt. When the discussion on the reform bill of 1832 admitted some rays of light into the mediæval dungeons of English law, crustaceans began to lose their vitality and to disappear, and insurgents like Mill, Langdale, Mackintosh, Romilly and Brougham took up the task where Bacon had left off. They fought often unprevailing, but with occasional victories the value of which no one at present disputes. Time would fail me to speak of the manner in which the warfare has been carried on by Field and by others in our own country. But the contest begun by Bacon still remains undecided.

<sup>1</sup> This is the concluding portion of that admirable address delivered by Hon. U. M. Rose, of Arkansas, at the last meeting of the Virginia Bar Association at Old Point Comfort. The

former portion of it was printed in our last number (81 Am. Law Rev. 1), under the title "Coke and Bacon: The Conservative Lawyer and the Law Reformer." — Eds. AM. LAW REV.



The most common objection to allowing the law to reveal itself in a statutory form, as Bacon proposed, is that case law is much more flexible than statutory law. If flexibility is what is desired, manifestly the best thing to do is to leave all questions to the discretion of the judge. But the quality of inflexibility, supposed to inhere in statutes, is a delusion. Most of us have heard how it was that the Statute of Uses, passed with great deliberation by King, Lords and Commons, had no other effect than that of adding three more words to conveyances of land; and most of us have observed how numerous statutes which seemed to a casual observer to be solid and rigid, under the skillful manipulation of the courts have first become flexible, then plastic, then fluid, until at last becoming gaseous, we have seen them exhale and disappear into interstellar space. What in our ignorance we had taken to be a promontory of firm land proved to be only an evanescent fog bank.

Flexibility is only another name for uncertainty; and proverbially the highest excellence of the law consists in its freedom from uncertainty. The law is supposed to be made up of rules; and flexibility or uncertainty is that which renders any rule ineffectual. Whatever is intelligible must have some definite form, or some power of resistance, or some consistency. The lawyer who wants flexible rules, is like the carpenter or the geometer who should attempt to draw straight lines along the edge of an unconfined shoe string. Consciously or unconsciously he favors that laxity which makes of the law a snare for the ignorant and the unwary, an accomplice of fraud and crime. The laws which "palter with us in a double sense" are worthy of the malediction which Macbeth at last bestowed on false prophets that

"——— keep the word of promise to our ear,  
But break it to our hope."

When laws are few, like those of Solon or Lycurgus, it is not difficult to reduce them to a written form. When they increase in number the difficulty increases. Thus the difficulty of making a code increases just as the need of a code becomes more urgent. With us the undertaking is so immense that we hardly dare give it a serious thought. The endeavor seems like that of putting

the ocean into a pint cup. Increase of knowledge brings confusion, and confusion requires a reduction to method. But our collection of card houses, made up of case law, is so extensive, so ramified, so void of contour, such a wilderness of perplexity, that we are afraid for any one to touch it. There is no map or bird's-eye view of it, no living guide that knows a tithe of its convolutions, labyrinths and entanglements, so that no lawyer is willing to trust any other lawyer or set of lawyers to undertake what seems to be a hopeless task. We know that the intelligent advocate of a code does not propose to change the law itself, but only to change the form in which it is expressed, cancelling whatever is obsolete, contradictory, or redundant, reducing the remainder to an orderly arrangement. But the Italians have a well-known saying that the translator always betrays; and as the proposed change of form is a kind of translation, we tremble for the result. We are afraid that while the wine is being decanted from one vessel into another some drop of the precious fluid may be lost; or that some fermentation may supervene that may impair the flavor of the whole. We recall the pleasant story told by Voltaire of the way in which the Sultan Haroun-al-Raschid caused all the wisdom of his vast library to be condensed first into five hundred volumes, then into one volume, and then into a single sentence, with an unexpected and disappointing result.

But every great change is attended with fears, many of which are usually groundless. By whomsoever done the work will no doubt bear that stamp of imperfection which seems to be the trade-mark of the visible universe; but it can hardly be worse than our present state in which the law is fast drifting from the region of the unknown to the region of the unknowable. After all, though the talents of Coke and the genius of Bacon would not be amiss in the accomplishment of such a task, yet the qualities required, though of a high order, are not really of the highest; patience, fidelity and accuracy being most in demand.

Cardinal Wolsey, who was certainly a sincere friend of the cause of education, desired to raise a fund out of the proceeds of confiscated estates to establish a university in London for instruction in the civil and common law; a measure which was defeated by the rapacity of the courtiers of Henry VIII.

Noticing this incident Lord Campbell says: "Such an institution is still a desideratum in England; for with splendid exceptions, it must be admitted that English barristers, though very clever practitioners, are not such able jurists as are to be found in other countries where law is systematically studied as a science."

Just here he struck a very sore spot. We have thousands of individual instances, mere snap-shots of the law on the rack, showing the law in countless contortions, a wilderness of notes without any text; but we have no scientific system.

In no way has the insular condition of England been more fully shown than in the development of her laws. Without dwelling on the European continental system, I may say in few words that by that system the laws are reduced to written codes; that the courts do not as such make any laws, their decision in one case not being authority in another. A council of revision looks after the written law, recommending needed changes as experience may suggest. In some countries this council is permanent; in others it is appointed from time to time as may seem needful. It is of course in communication with distinguished judges and jurists throughout the country; and its influence on the legislative department is paramount, though not decisive.

Comparative jurisprudence is a subject so extensive that it is necessarily but little understood; but it must not be inferred that English law has not been studied by continental jurists. It has been studied closely by specialists; and one of its institutions, that of trial by jury, has been in modern times adopted into various continental systems. Nevertheless I believe that it would be quite impossible to find that any continental jurist has ever expressed a preference for judge-made law, that peculiar institution of the English-speaking races.

The entire adoption of the continental system is not practicable, and is really not desirable. Our lawyers would never consent to a change so radical as that which would result from the adoption of the practice of continental courts, which in deciding cases, briefly recite a few facts, and then pronounce judgment without citing authorities beyond perhaps an occasional refer-

ence to the code. The question is whether Bacon was right in thinking that case law should be regarded as only provisional, and that it ought to be revised, arranged, condensed and re-uttered in statutory form, so that the whole law might be briefer, more systematic, more comprehensive, more intelligible and more authoritative.

It is said by historians that just before the compilation of the codes of Justinian, the Roman law had become so voluminous that no one could understand it, and that the books which contained it would have made a load for many camels; but it would be easy to show that our law books are far more numerous than could ever have been those of Rome, or indeed of any other country.

Our law is fragmentary. It is like the broken mirror of Richard II.; and day by day it is broken into still smaller pieces. It is for the most part a vast and heterogeneous collection of individual instances. Since the time that Coke made his accurate survey of English law the great books of the common law have never been adequately posted up. Since that time, now more than two hundred and fifty years, entries have only been made in journals, blotters, day books, in loose memoranda on detached sheets; and by almost any one that desired to write on the subject. When we want to know how any particular account stands, we refer to all manner of writers and judges as experts, who disagree after the manner of experts. The courts are perpetually in conflict. If Charles V. could not succeed in making a few clocks keep time together, it would be sheer madness to expect that a hundred or so of courts whose reports are printed, could be kept in accord. On almost every question they are found to vary; and they are generally as divergent as Sampson's foxes.

We have had various labor-saving devices, Leading Cases, Selected Cases, American Decisions, American Reports, and so on. Then we have annual volumes on certain topics of the law, legitimate successors of the annual Keepsakes, Tokens, and Books of Beauty, issued by Lady Blessington and others in the first half of this century. Then we have digests and text-books on all subjects without number. But these we can hardly use in

court; for while one section or one page may be favorable to our views, the next will be hostile; so that, whatever we may use in the seclusion of our chambers, what we require in the courtroom is the uncontradicted, the immaculate, the austere, the uncriticised original report.

Where there is such a conflict among the authorities uniform results are not to be expected. A judge may decide almost any question any way, and still be supported by an array of cases; and his decision will at last probably be the result of temperament or of prepossession. It is one of the maxims of our law that that law is the best that leaves the least discretion to the judge. But in the existing conflict of authorities a judge can hardly decide anything without exercising his discretion. A choice between antagonizing cases involves a large discretion. I apprehend that if by some photographic process we could get a visible outline of our nebular system of law, it would appear very much in the shape of the chancellor's foot. The mere fact that every judge attempts to express his conception of the law in his own language must of itself be productive of endless controversy.

Our text-books are for the most part collections of multitudinous head-notes, which are no more than compressed tablets of the law, warranted to keep in all climates, convenient for administration to all the courts; but as no two of them are alike, and as they are liable to interact upon and to neutralize each other, their effect on the judicial economy is only a matter of conjecture. The glorious uncertainty of the law which was some time a proverb has become a truism.

A man's library is often a fair index to his character. Coke's library consisted of folios, not many in number; for in those days there were only twelve volumes of reports, of which nine were year books. Besides these he had the statutes of the realm, and various abridgments. His library, though exhaustive, was not large. We may suppose that a single shelf might hold all the books of a law library of that time.

Nothing is more in contrast with the age of Elizabeth than the modern deluge of books. There are now added to the National Library in Paris about 60,000 volumes a year, making about 6,000,000 volumes in the course of a century, even if there

should be no increase from year to year. In various other public libraries the number of annual additions is perhaps no less. Of this 60,000, it is quite impossible that more than 500 volumes can have any reasonable or even tolerable excuse for being. When we look at the books and pamphlets that litter our book stalls, for the most part mere sweepings of vacant chambers, it seems a pity that most of them shall be handed down to a remote posterity like the mummied cats of Egypt. If things go on in this way for a thousand years it is hard to see how such vast collections as must accumulate can be housed and cared for. As books continue to breed like rabbits in Australia, the time may come when it may be a thing to mention in one's epitaph as commending him to all ages that he never wrote a book, and when the man that utterly extirpates a book will receive more honor than one who has written a hundred; but before that time comes it would be a public boon if the Malthusian doctrine for the restriction of population could be applied to the production of books. It seems a pity that the tribunal composed of the barber and the curate that disposed of the library of Don Quixote could not have been perpetuated with an immense increase of jurisdiction. But no books increase faster than our law reports. It is deplorable that there cannot be some kind of central clearing house, where reported cases may cancel each other, leaving us some net and intelligible result. If things go on at the present rate, the time must soon come when any new Omar will be hailed as a deliverer and as a public benefactor.

Years ago they had a law in Sweden that possessed some excellent features. Whoever wrote a foolish or an evil book was condemned to eat it under penalty of death. He thus appeared in the character of Saturn devouring his own children. By a humane provision the author was allowed to serve up his book with such ingredients as might render it most palatable. Theodore Reinking, having written a stupid book in Latin on political subjects, was condemned under this law in 1644. It is said that he cooked his book up into some kind of a sauce, in which form it no doubt acquired a piquancy that it had not before possessed. The punishment was presumably effectual, as there is no evidence that he appeared again as an author, probably having lost

his taste for books. Such a law would not only lessen the number of books, but it would promote brevity and simplicity of style; for if a man were in danger of having literally to eat his own words, it may be supposed that he would not use any more than were necessary, and that he would avoid sesquipedalian words, any one of which would suffice for a hearty meal; while the rigid enforcement of such a law would tend greatly to promote the improvement of the culinary art, to say nothing of the accurate knowledge that would be acquired as to the effect of different kinds of literary diet on the digestive organs.

A year or so ago I read what seemed to be a very sensible report by one of your committees on the subject of the avalanche of law books that daily issues from the teeming press. Soon afterwards I saw a notice of this report in a publisher's circular, in which the publisher said that if lawyers did not want new books, the remedy was easy; they need not buy them. It was very kind of him to say so; and what he said was true; but it was not the whole truth. Collectively we could refuse to buy such books, individually we cannot. We are like the armed powers of Europe. Each and all would be benefited by a general disarmament; but neither can disarm unless all the rest will do so. As nearly all of our law stands on the shifting sands of individual cases, and as every new case, like every new child that is born, is fraught with unknown possibilities, self-preservation requires that we shall keep up with the disorderly and rapidly moving procession as well as we can; and as we cannot remember one case out of a hundred, even if we had time to read them all, we have to buy digests and text-books without number, good, bad and indifferent, to serve as convenient indexes. If we fail to act thus, dire will be our fate. If, for instance, we have occasion to refer in argument to the Dartmouth College case, we may apprehend that our adversary, holding aloft a late issue of some reporter, will triumphantly announce that that decision has been overruled by the Supreme Court of Alaska, a fact that he supposed was known to every practicing lawyer; or, if emulating the eloquence of Patrick Henry, we refer to the Magna Charta, our opponent will announce with fiendish exultation that he holds in his hand a book fresh from the press, a

book destined to form an epoch in the history of jurisprudence, a mature work on the Statute of Limitations as applied to Estrays, written by a retired minister of the gospel of several years standing, which demonstrates conclusively that the Magna Charta was never enacted in the manner required by the English constitution. Happy shall we be if we shall be able to produce some printed paragraph saying that the learned judges of the Supreme Court of Alaska have fallen into an error as to the Dartmouth College case, or that the extremely erudite author of the text-book mentioned has drawn his conclusion from insufficient data. Thus it is that we have to buy all the latest books, if for nothing else in order to defend ourselves against the bad law that is constantly being exploded on the profession. To a traveler from Cathay it might well seem that the legal profession is organized and maintained solely in the interest of booksellers.

To the really thoughtful mind the expedient of a strike must sometimes have suggested itself. If we were only organized, and had a master lawyer, who could tell us how and when to strike, and if we could manage to evade Federal injunctions, we might march on the principal publishing centers, and, firing their immense magazines of unsold law books, we might feel one moment of delirious joy to see the landscape illuminated by what Coke called "the gladsome light of jurisprudence."

Or if we preferred milder measures, we might issue an ultimatum, saying: "We do not want any more of your books. If the law is a science at all, anything capable of human comprehension, we have more books now on that subject than there are on all other scientific subjects put together, leaving out of course all those that are wholly obsolete on one side. Mind cannot master them, the memory cannot retain them. Extremes meet, and too much law is the same as no law. By dint of endless repetitions counsel is darkened, by reason of multitudinous illustrations the rule is lost sight of."

In arguing the case of *Jones v. Randall*,<sup>1</sup> before Lord Mansfield, Mr. Dunning said: "The laws of this country are clear, evident and certain; all the judges know the laws, and, knowing them, administer them with uprightness and integrity."

<sup>1</sup> Cowp. 38.



Mr. Dunning certainly displayed a keen sense of humor; but Mansfield, true to his Scotch origin, answered seriously, saying: "As to the certainty of the law mentioned by Mr. Dunning, it would be hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort."

The rule, correctly stated, is that all men are presumed to know the law except the judges of the courts. They are not presumed to know it; and hence they cannot be held responsible for any official conduct based on ignorance or misconception of the law. The courts, which are only the judges idealized, are however presumed to know the law; a presumption that can be safely indulged, since it involves no personal liability; a mere complimentary fiction, as most lawyers know, like the presumption that all men are innocent.

None of us pretend to know the law; or if we know it at all it is in a very general way, something like the manner in which we know our native country, by maps, by boundaries, by great mountain ranges, and by a few landscapes, being ignorant of the most of the multitudinous details. When asked a question about the law, whether written or unwritten, we answer with a modesty and distrust not innate, but which is the fruit of many surprises and disappointments. We never could have known much of such a boundless subject; and much that we may have known has been forgotten.

Mr. Livingston, in his report on the penal code of Louisiana, said: "Is it not a mockery to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for a book that contained it, he would smile at my ignorance, and, pointing to about five hundred volumes on his shelves, would tell me that these contained a small part of it; that the rest was either unwritten, or might be found in London or New York, or was shut up in the breasts of the judges at Westminster Hall."

At present an American lawyer, pointing to shelves containing at least five thousand volumes, would say that no one knows, or pretends, or hopes ever to know the law. Were Coke alive now he would not pretend to know all the unwritten law. Such stu-

pendous knowledge was never vouchsafed to mortals. We are soon to have a digest that is to contain references to nearly five hundred thousand American cases, overflowing, like the floods of Egypt, through all the letters of the alphabet.

Our statutes are for the most part as fragmentary as the unwritten law. Drawn up often by some rural member who is trying his prentice hand on legislation, and who would not hesitate to change the orbits of the planets if he had a chance, mutilated in the legislative mill, thundering in the preface with preposterous titles and irrelevant preambles, contused, riddled and broken by discordant and conflicting amendments, dislocated and distorted by impossible provisos, they inspire us with a sense of dismay; so that after perusing them repeatedly we are fain to confess that they are like the "idle tears," and that we "know not what they mean." Or if the statute is more carefully drawn, and by a more competent hand, it will generally be found to be a mere stone or log thrown in for the purpose of checking or diverting some current of judge-made law, with the unexpected result of overflowing remote gardens and plantations of which the author of the statute had never a thought.

The time was when it was supposed to be a reproach to call one a case lawyer; but now we are all either case lawyers, or are not lawyers at all. Cases are our counters, and there are no coins. Our legal arguments are for the most part a mere casino-like matching and unmatching of cases, involving little or no intellectual effort. The law is ceasing to be a question of principles, and is becoming a mere question of patterns. Often we have to snatch the cases from the vast mouldering heap in haste. Some of them may have been overruled, others may be moribund; some of them may be like *Thoroughgood v. Bryan*, overruled by the court that made them, or like *Dumpor's case*, repealed by act of Parliament, but still having a posthumous existence in some of our States. We do not know how the matter may stand; but we walk out on the unsteady footing of these cases to the extreme limit, and marshal the court the way it should go. The judge may be learned; but he may know no more of these particular cases than we do. The familiar sound of *Brown v. Jones* may awaken some far-off memory like the reminiscences

of childhood; and on the faith of that case he may decide the question one way or the other, only to find out afterwards that he was in error, as the case that he recalled was another case between the same inveterate litigants.

Brown and Jones, whose quarrels live after them, have been overtaken by a strange destiny. They disputed perhaps about an ox found damage feasant, levant and couchant; and, going to law tooth and nail, they hurled sulphurous imprecations at each other, and cherished a mutual hatred that might be compared in intensity to that which animated Coke and Bacon. Their warfare is over, and they have long since been buried in remote and forgotten graves; but now by the irony of fate they appear in all law books bracketed together in an eternal embrace, like Francesca da Rimini and her lover in the shades below; and their united names serve as a tag to indicate some particular principle or axiom of the law over which new controversies arise from time to time. Seeing them so often engaged in this *pas de deux* this modern Damon and Pythias might seem to be as inseparable as the Siamese twins; but at rare intervals we catch a glimpse of one or the other of them walking alone *ex parte*, as if in a trance, "wrapped in the solitude of his own originality." Obscure as they were, a certain amount of mystery attended their coming hither and their going hence; but if, either jointly or severally, they served to make clearer the difference between trespass and case, or to explain the true inwardness of the *Absque Hoc*, surely they did not live in vain.

The trial of each case in our courts brings with it a retrial of many former cases; and each lawyer engaged in court sets up his own mental alembic in order to distill the law of the cases cited by him from the concrete facts in which it is embodied; a task requiring time, patience and discrimination, but which must often be accomplished with a degree of haste which renders anything like accuracy impossible. In many instances we simply call over our rosary of cases, pitting against one decision by Chief Justice Marshall ten later ones rendered by Mr. Justice Shallow, without any attempt at discrimination as to facts, partly because lack of time forbids that necessary process.

With proper relays of books there is no reason why under our

system a legal argument should not go on forever, provided the principal actors could be rendered immortal, and could be made proof against exhaustion. As the matter stands, after the incumbent of the bench has been pelted with cases of every degree of relevancy and irrelevancy for some hours, during the latter part of which time, being now thoroughly hypnotized, he has been engaged in a vain effort to find out what the universe was made for, he finally recovers sufficient animation to pass on the question, "so ably and exhaustively discussed at the bar," as he is pleased to remark, deciding, perhaps, as charitable people are wont to do, in favor of the most importunate beggar, who is generally the worst of the lot. For no truer thing has been uttered than was spoken by Judge Dillon, who says:—

"When the judges resort, as they frequently do, to *analogies* supposed to be furnished by previous cases for the rule of decision to apply to the case in hand, it must often be extremely uncertain in advance what the result will be; and it is frequently doubtful whether, fettered in this way, they reach as sound results as if governed by general considerations of what is right and just." <sup>1</sup>

I have made no special estimate; but I think I cannot be far wrong in supposing that there are in this country to-day in common use at least ten times as many law books as there were forty years ago; and during the last twenty years the progressive increase in the number of such books has been greatly in excess of all previous calculations. A short chapter, in Blackstone's Commentaries, on Corporations is now expanded into the *magnum opus* of Judge Thompson on that subject, consisting of six volumes of more than a thousand pages each, of which a proper index, as the publishers inform us, would require a volume of from four hundred to eight hundred pages.

The most of the new cases that are reported are in principle mere repetitions of former cases; and as such they are not only useless, but detrimental. More than two hundred years ago the Statute of Frauds of Charles II. was enacted. It seemed to be simple enough, comprising only a few sections; but the last

<sup>1</sup> Law and Jurisprudence of England and America, p. 272, n.

work on the subject of this statute is a bulky volume, containing reference to thousands of cases. It must be plain that if with all of the adjudications we do not understand the statute, then we never can do so. Indeed, the statute is so stuck all over with cases, just as the hull of a ship is sometimes stuck all over with barnacles, that we hardly ever see it; and whenever we consult that branch of the law we lose ourselves among the glosses that have been put upon it. In short, our legal science tends rapidly to a mere strife of words not unlike that in which scholastic learning finally broke up and disappeared.

Of course one may be an advocate of codification without approving of many wild optimistic theories that have emanated from its most enthusiastic partisans. If Bentham seems to belong to that class it must be remembered that when he took up arms against the existing state of the law, English jurisprudence was burdened and disgraced by many absurdities, which have since disappeared under an influence which Bentham was the first to inspire into the public mind. It must also be conceded that the excessive zeal of reformers is sometimes beneficial in redressing the balance that is ruled by an equally unreasonable conservatism.

A medium course would no doubt be safest. A few judicious additions to our Statute of Frauds, for instance, might condense and give definite expression to whole volumes of case law. Recently the commercial law of England has been enacted as a statute consisting of a hundred sections, reducing the volume of the law on that subject, as was estimated by the author of the statute, to about one five thousandth part of its former bulk. In this country the reduction by the same process would hardly be less than one fifty thousandth part.

The statute referred to seems to have given very great satisfaction in England; but some such work is much more needed here than there, both on account of the greater number of our law books, and on account of an anomaly that exists nowhere else. Ever since the decision in *Swift v. Tyson*, it has been held by the Federal courts that they are not bound to follow the decisions of the State courts of last resort in respect of questions of general commercial law. Thus it often happens that a

State court and a Federal court sitting side by side will purposely decide cases on a like state of facts differently. This gives to the complaining party in many instances not only a choice of forums, but also a choice of results; an evil which ought not to exist, an evil which would not exist, if the law on this subject were reduced to the form of a statute, either State or Federal. Perhaps if Congress could be induced to pass an interstate and international commercial code, all the States would soon adopt it; and this would certainly be a great improvement on our present chaotic methods. There are other branches of the law that, like commercial law, naturally lend themselves to codification; and prudence would suggest that they should first receive attention, the process being gradually extended to other topics.

In England the constitution is unwritten. It is nothing but a collection of customs more or less vague. There is a notion that in order to be respected it must be concealed, or wrapped in mystery like the veiled prophet. No one knows what it is, and anyone can claim for it whatever he likes. We in America assume that we occupy in this regard a much more enlightened position. Our organic law is all written, so that anyone can read it that pleases. It is more important than all other laws put together. It sums up all the guaranties of rights of property, of life and of liberty, precious heir-looms acquired after ages of deadly strife and warfare, sealed with the blood of a long line of patriots and brave men. While we do not question the necessity of expressing the fundamental law relating to these vital principles in terse and deliberate language through the organ of conventions composed chiefly of laymen, we scruple to undertake the perilous task of reducing to peremptory and plain written words the law relating to bills of exchange and promissory notes.

“The frightful accumulation of case law,” said Sir Henry Maine, “conveys to English jurisprudence a menace of revolution far more serious than any popular murmurs, and which, if it does nothing else, is giving to mere tenacity of memory a disgraceful advantage over all the finer qualities of the legal intellect.”<sup>1</sup>

<sup>1</sup> Village Communities, p. 347.

In this country of course the case is far worse. Compared with that of the American lawyer, with his prodigious collection of cases, the condition of the Chinese printer with his hundred thousand separate blocks with which to set up the printed page, is enviable.

Reviled or contemned, whoever favors a rational law reform may possess his soul in peace. The stars in their course fight for him. Sooner or later the present system must break down under its own weight. Every new case that is decided, every new digest or text-book that is issued, but hastens the day when the great Pontine marsh of case law shall be drained.

When Napoleon at St. Helena looked back over the past, he said: "My code is the sheet anchor that will save France, and will entitle me to the benediction of posterity."

His genius and energy had sufficed to compress the evolution of centuries into less than a lifetime; and now, when his scepter had turned to ashes, when all his conquests had been wrenched away, and he was a lonely prisoner far from the scenes of his triumphs, something told him that beyond his victories on the field of battle, more enduring than towering arch, or stately column, or marble sepulcher, would be a work of peace to which he had given only a part of four months of his time, a work unstained with blood, unpolluted with crime.

Perhaps I cannot better close what I had to say this evening on a topic that requires much more ample and profound consideration than I have been able to give it, than by quoting the language of a modern writer: —

"A petty State, having little to boast of, may well keep its laws, or what are called its laws, hidden in obscurity; but a great country loses half its dignity and strength when it cannot in an orderly and methodical way give some account to all whom it may concern of the main reasons why its social progress and the contentment of its citizens have been so well assured."<sup>1</sup>

<sup>1</sup> 1 Paterson, Lib. Subject, 175.

## AMERICAN LAWYERS AND THEIR MAKING.

"The pleader's part is doubtless much harder than that of the preacher; and yet in my opinion, we see more passable lawyers than preachers, at least in France." So said that great human writer, Michael De Montaigne, uttering in medieval France a voice as modern as Plutarch's.

Oddly enough these two professions seem to be equally demanded in the society of our time and country, where neither is supported by the State, since the last census of the United States shows that lawyers and clergymen are there almost the same in numbers.

The old idea was that the lawyer was the parent of discord and contention. *Bonus jurista malus Christa*, ran the Latin proverb, "A good lawyer, a bad Christian." This was the common sentiment of kings, philosophers, and peasants. So Ferdinand when sending colonies to the Indies "ordained that they should not carry with the many law-students lest suits should get footing in that new world." Plato in his "Republic" declared "That lawyers and physicians are the pests of the country," and Sir Thomas More would have no lawyers in his Utopia as "a sort of people whose profession it is to disguise *matters* as well as wrest *laws*," and the rustic prayer "My body from the doctors, my pocket from the lawyers, my soul from the devil" chimes in with the chorus of princes and pundits.

And yet this evil and decried profession has strangely thriven in that "new world," in the great republic, in our western Utopia. Says Mr. Bryce, "The bar has usually been very powerful in America, not only as being the only class of educated men who are at once men of affairs and skilled speakers, but also because there has been no nobility or territorial aristocracy to overshadow it." "Politics have been largely in its hands." \* \* \* "For the first sixty or seventy years of the republic the leading statesmen were lawyers and the lawyers as a whole moulded the public opinion of the country."



And De Tocqueville, more than half a century earlier, declared "If I were asked where I place the American aristocracy I should reply without hesitation that it is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and bar."

Said the late Chief Justice Ryan of Wisconsin, echoing this sentiment with less of moderation, "The American aristocracy of intellect is substantially the American bar," and the Lord Chief Justice of England has spoken within the year of the large and commanding influence which the legal profession has attained in these United States.

Far be it from me to agree with this indiscriminate exaltation of the service or the place of the bar, so largely from its own members. All men are in danger of observing with exaggerated appreciation the labors and achievements of their own order and of living in strange oblivion as to what their neighbors of some other pursuit are accomplishing. But the great participation of lawyers in public affairs in this Republic cannot be questioned. We are not subjects of King George the Third but, as much as any nation on earth, we have given credence to his famous old saying that "Every man is good enough for any place he can get," and the lawyers have been able to obtain more than one-half of the great offices of the country from its foundation down to the present time.

The lawyer in office is now, however, beginning to be overshadowed by the very rich class which is taking the place in some ways of the "*nobility or territorial aristocracy*," whose absence Mr. Bryce remarked. The lawyers are still elected to the great places but the chairman of the committee which manages the campaign and the heaviest subscriber to the uncounted treasures of the campaign fund, are of the other class and tend to impair the former undisputed pre-eminence of the man of law with his majorities. Richard of Warwick is greater than Henry of Lancaster, or Edward of York, the king-maker, is greater than the king.

Said Sir Horace Davy not long since, while he was testifying before a royal commission, "Of course law is the mode of regulating the social life of people, in the interest of the commun-

ity," and, taking the law which lawyers study and expound in that broad sense, it is easy to account for the important part they play in the public life of any free country. It will not be found that they have any corresponding predominance among the more degraded peoples or under the more despotic governments. "Where there has been freedom, there have been advocates, even in the forests of old Germany," says M. Le Berquier, and he goes on to point out that they are the result and corollary of "the right of defense" and that thus advocacy flourished under the Roman republic but declined under innumerable restraining ordinances in the time of the empire.

It is a mark of advancement when one who deems himself wronged seeks redress before a tribunal of justice by the aid of a lawyer. The fact that an important and well recognized class of men is maintained in every civilized country of the globe, trained and licensed to assert and defend other men's rights with the persuasions of reason alone, is the highest evidence of the progress of mankind. Cicero could say that all men enjoyed their prosperity under the shelter of the soldier. That is much less directly true now than then, since all private contention is settled before the courts and even in international differences the lawyer's voice is more and more heard and with ever increasing potency, substituting persuasion for the bloody brawls of war and that too where he comes to assert no enacted law, but is armed only with words of reason, saying only "This is right and that is wrong," and compelling justice by an appeal to the common conscience and common sense of the world.

"That Justice and its administration," to borrow the words of Lord Chief Justice Russell, "are amongst the prime needs and business of life," is a fact recognized by the existence and position of the bar.

Turning to the history of the bar and of legal instruction in America we find in our colonial period but few lawyers and those mostly of little note until the stirrings for liberty immediately before the Revolution.

While Mansfield was thundering against us and Camden for us at Westminster, Patrick Henry, after six weeks of study, had been licensed to practice and had sprung into sudden fame

by winning his famous "Parson's Case," against the hated clergy of the established church in Virginia and was gaining undying glory by his eloquent advocacy of the rights of the people. In the same year in which Henry won his spurs (1755) John Marshall, later the Chief Justice, was born, but it was only after his law studies had been broken by service in the army of the Revolution that the greatest of our American bar was enrolled upon its records.

It is not easy to recall legal names of earlier date in this country. Blackstone's Commentaries are said to have been found beside the Bible in the house of many a layman. Mr. Hammond, the learned editor of the Commentaries, says there is abundant evidence that nearly 2,500 copies of them were distributed through the Thirteen Colonies before the Declaration of Independence.

But the early lawyers who first came among our colonists to practice were driven out by the jealous hostility which they met. In Massachusetts the term attorney seems to have been so ill regarded that it was slanderous to apply it to a worshipful person and in 1632 Thomas Dexter was sentenced to be set in the bilbowse, disfranchised and fined forty pounds for some disrespectful words of the government, culminating with the declaration "that the best of them was but an *attorney*," and two years later John Lee was ordered to be whipped and fined a like sum of forty pounds for saying the governor "was but a lawyer's clerk and what understanding had he more than himself." Mr. Austin Fox quoted to the American Bar Association in August last a letter of a farmer written as late as 1782 declaiming against lawyers and predicting that "In another century the law will possess in the north what now the church possesses in Peru and Mexico." Yet out of the thickets of jovial but domineering country gentlemen in the south and of austere but domineering parsons in the north, by the time of the Declaration of Independence, or immediately thereafter, had emerged into leadership a brilliant line of lawyers. Liberty had come, in hope or in fact, and with her these inseparable attendants. Patrick Henry and Marshall we have mentioned in Virginia, Jay, Hamilton, Aaron Burr, Gouverneur Morris, the Livingstons

were known in New York; Oliver Ellsworth and Roger Sherman in Connecticut; Samuel Adams, James Otis and Richard Dana in Massachusetts. These are merely typical names. No one can dispute the fact that from that time to this lawyers have held an important place in the public life of America. But in the beginning and long afterwards the education of lawyers was as ill-provided for as in the mother country.

The first law lecture under collegiate authority that we know of delivered in the United States was on the 15th of December, 1790.

A wit at a Philadelphia dinner proposed "the memory of the three great Philadelphians: Benjamin Franklin of *Boston*, Albert Gallatin of *Geneva*, and James Wilson of *Edinburgh*." This same James Wilson was a highly educated Scotchman who signed the Declaration of Independence, and took a prominent part in the convention which framed our Federal constitution. He was later appointed to a seat on the supreme bench of the new nation he had helped to form. In 1790 he was elected to fill the professorship of law just created in the University of Philadelphia and on the day named he gave his opening address before an audience we would have all liked to see. The judges of the courts and the bar were there to do honor to the first collegiate attempt at legal education; so were the Chief Executive, and the legislative departments of the commonwealth of Pennsylvania and of the city of Philadelphia. There, too, were both houses of Congress, yet unshorn of the founders of the republic, and there was General Washington, our first President, attended by all his cabinet. Mrs. Washington too graced the occasion, and Mrs. Hamilton, the daughter of the heroic Schuyler, and many "powdered dames," whose presence the lecturer acknowledged with heavy and elaborate gallantry, making ponderous allusion to the unusual embarrassment of speaking before "the fair." But his labored written discourses, begun with such distinction, were continued for little over one year and are incomplete, not covering the ground intended, although published after their author's death. He was shortly engaged to prepare a digest and codification of the statutes in force in Pennsylvania and turned his leisure to that task (for the Supreme Court then

had constantly to adjourn for lack of business), but, after much labor and expense, he was denied reimbursement by the legislature and left this task likewise unfinished.

A more modest undertaking by New England men in a Connecticut village had been begun in about 1783, when Tapping Reeve (author of the treatise on Domestic Relations which all American lawyers still know) began to give legal instruction at Litchfield Hill. This is called the first regular school for instruction in English law. In 1798 Mr. Reeve was appointed a justice of the Supreme Court of Connecticut and later became its Chief Justice and Honorable James Gould (of Gould's Pleadings in Civil Actions) from that time shared his work. When Judge Reeve retired Jebez W. Huntington took his place, but these three were the only instructors the famous Litchfield School ever had in its life of half a century. Its attendance in 1813 rose to fifty students, a great number for that time, and it added to the bar about one thousand of our early lawyers. It was a private, unincorporated, unendowed school and had no power to confer a degree. Mr. Reeve and Mr. Gould lectured and the little band of students took down their discourses in full and generally neatly transcribed them, after comparing notes with their fellows, in five large volumes. Mr. Huntington held an examination every Saturday on the work of the preceding week. In 1833 this pioneer law school was discontinued but Judge Samuel How, having studied at Litchfield, had ten years earlier established a like school at Northampton, with his former law partner, Honorable Elijah H. Mills, United States Senator from Massachusetts. Mr. Mills' partner, Mr. Ashmun, was joined to the corps of teachers in 1827 but the average attendance never seems to have exceeded ten and in 1829 it was closed on Mr. Ashmun accepting an invitation to join the faculty of Harvard Law School.

Isaac Royal of Massachusetts, true to his name, went to England after the battle of Lexington and died there in 1781. Two years before his death he made his will in England, devising to Harvard College of Cambridge, Massachusetts, for the endowment of a professorship of law, or physic, or anatomy, more than 2,000 acres of Massachusetts land. This devise was not realized on until 1815, when nearly \$8,000 having been derived

from it, this was first devoted to establishing a professorship of law. An income of about \$400 arose from the fund, the fees of the students were added, and Mr. Justice (later Chief Justice) Parker of Massachusetts was appointed Royal Professor. Two years later, 1817, Asahel Stearns was appointed University Professor of Law and the college statutes required him to open and keep a school in Cambridge for the instruction of the graduates of the University and others prosecuting the study of law, and this is commonly given as the date of the founding of Harvard Law School, now the oldest in the country.

The average annual attendance for the first ten or eleven years was eight.

In 1829 Nathan Dane of "Dane's Abridgment" and for whom is claimed the authorship of the famous ordinance of 1787 for the government of the Northwest Territory, generously gave the struggling school the profits of his "Abridgment" of the law. This secured the services of Joseph Story who, Mr. Dane requested, might be the first incumbent in the Dane Professorship. The gift amounted to \$10,000 and at his death Mr. Dane added \$5,000 more. For the sixteen remaining years of his life Judge Story continued to hold this chair and thus were written for that little, meagerly endowed law school, "Story's Commentaries" which Mr. Lecky, in his recent work on "Democracy and Liberty" ranks beside the Constitution and the Federalist as unsurpassed among the intellectual achievements of America. They made the school national in scope and reputation and began the prosperous career of that law school, most venerable in years and easily the first in reputation and accomplishment among those of this nation.

The Yale Law School took its origin in the teaching of law privately by Mr. Staples at New Haven. He presently invited other lawyers to his assistance. In 1824 the names of the students of this school were first printed in the Yale catalogue and two years later, the friends of Chancellor Kent having established the Kent Professorship of Law at Yale, Judge Daggett, the head of the Staples school, was chosen to fill it, so that the school was united with the college. Its reputation is not so high as that of some others nor is its attendance so large although it

commands the services of some gifted and eminent men, as Honorable Edward J. Phelps, late minister to England, and Judge Baldwin.

The University of Virginia founded a law school in 1825. Some lawyers educated at the Litchfield school established the Cincinnati school in 1833, which was the first west of the Alleghany mountains.

The Albany Law School, which long held a leading place, was founded in 1851 and has since been affiliated with Union College.

In 1852 the trustees of the University of Pennsylvania appointed a faculty of law at Philadelphia.

In 1858 the trustees of Columbia College established their school of law in New York with a two years' course of instruction, calling Professor Theodore Dwight from Hamilton College to its head, where he continued until near his death, meeting with great success to the last.

In 1859 the Law Department of the University of Michigan was opened with a faculty headed by Thomas M. Cooley, destined to attain from that beginning high judicial place and a classical fame as a law writer.

From that time on law schools have rapidly increased in numbers, attendance and equipment.

In the West as well as the East the liberality of well prospered lawyers and men of fortune has been joined to the authority of the State in establishing these nurseries of the bar, as in California where ex-Chief Justice Hastings in 1877 gave \$100,000 to found the Hastings School of Law in connection with the University of that State.

University after university has added to its staff a faculty of law and large attendance has almost instantly answered to liberal opportunity, as in the case of Cornell University, whose Department of Law dates only from 1887, yet, with a strong faculty and splendid library, it is already one of the great schools of the country. Now we may say that hardly a leading university or great city in the country lacks its well-established law school.

The number of students in these institutions illustrates their growth better than any list of their names. Thus we have seen,

say eighty-five years ago, one school in existence with at its best 50 students in attendance (less than one-half as many as matriculated in the Junior class of the College of Law of my own University of Wisconsin this present year). In 1870 the law schools of the nation returned 1,611 students; in 1886, 3,054; in 1891, 6,106; and in 1894, more than 7,600 students were listed in their catalogues, and 6,379 of the above law students were residents of the State in which they were studying; that is more than five-sixths of them. In 1894 there were enumerated 72 schools of law within our borders, all but 7 of them associated with universities and in 1896 the number of schools had increased to 85 and of law students entered in them to 9,607. These are the figures given in the report of the American Bar Association for 1896, and the attendance of seven schools is omitted for lack of information as to the same, so that the total number of students probably exceeds 10,000.

This all shows that the question, long debated, of whether aspirants for admission to the bar will submit themselves to the requirements and value the advantages of schools of law, has been roundly decided in the affirmative.

The old method of admission to the bar was by the courts on examination by an extemporized committee of lawyers, named by the judge, and this still prevails in many States. No method could be less adequate under the best, or more grotesque and absurd under inferior judges. Too often the standard set was on a par with that of a military president who, desiring to appoint an old protege to a Federal judgeship, answered an earnest protest from his advisers at the incompetence of the candidate by saying "*But he has studied law a whole year — nights.*"

Theodore Dwight related that in a court presided over by the accomplished Mr. Justice Nelson, he was called to practice on an examination in which the only question asked him was the fundamental one, on what morning of a particular week in the term of the Supreme Court a specific motion should be made, the day being fixed by rule of court. No one can doubt that the Virginia student who on his examination being asked "What is a fee simple?" answered in good faith "About two dollars and a half," was promptly certified to be proficient in the law.



Now, in a considerable number of States, a permanent commission of lawyers appointed by the highest court has exclusive control of examinations for the bar, save only as the degrees of certain colleges of law by statute take the place of such examinations.

The wisdom of requiring adequate legal training for admission to the bar is hardly an open question, but the best way of affording such training is still a burning question.

When in 1823 by the changes of the New York constitution James Kent was legislated out of his great place as Chancellor, at the age of sixty, that being the limit of age allowed, he was as once invited to take the position of professor of law at Columbia College, and accepting, he wrote and read to his classes "Kent's Commentaries" much as Sir William Blackstone at Oxford in the preceding century had written and delivered his even more famous compendium, not for the technical training of candidates for the bar, but for the education in the law of college students as a branch of general knowledge. He held no examinations, he prescribed no course of study, his instruction led up to no degree in law. He and the great New Englanders, Story, Parsons, and Greenleaf, seem to have quietly delivered their well written discourses on the law with little attempt to exercise the powers of the student other than those of memory, and their methods were the usual methods of the day.

Mr. Theodore Dwight is particularly identified with a reformation in law teaching, marked by a more animated participation of the students by questions and answers upon certain assigned reading in a text-book. Under this method, often called the Dwight method, the instructor also expounds the text orally in familiar language and with pertinent illustration and citation. That is still perhaps the prevalent method.

About twenty-six years ago Mr. Langdell was called to the Dane Professorship of the Harvard School and introduced a still more advanced method, namely, the inductive method, or "case system," so-called, by which almost the entire instruction in many branches is made to consist in reading decided cases, carefully selected so as to illustrate and exhibit the formation and growth of the main principles of the law. The students are

called on to state the facts of the case discriminatingly, and then the decision; they then analyse and discuss the reasoning, making it the subject of zealous debate over which the instructor merely presides, aiding in drawing out the discussion, calling on students to apply the principles to various kindred but not identical facts, comparing the case with others on the same subject and summing up at the close. This is the system now prevalent at Harvard and Columbia and in part at Cornell, University of the City of New York, Pennsylvania, Northwestern, Michigan, California, Colorado, Iowa, Leland-Stanford, Western Reserve and Wisconsin. The Harvard men say for it that it has made the law school the hardest working department in their University. That it takes care of itself where it is once introduced; that the students cannot be kept in the classes where it is not used; and President Elliot of Harvard has been able to announce this very practical result, that more offers of employment for its graduates at living rates were made to the law school than there were graduates to take. It has won the unqualified approval of Judge Oliver Wendell Holmes, Jr., educated under a different system, and of James Carter, Esq., and Honorable Joseph Choate, commonly ranked as the two leaders of the New York bar, and the commendation of such divergent but valued teachers of and writers on law as Austin Abbott, Henry Wade Rogers, Emlin McLane and Judge Dillon, and if the writer may humbly add his own experience, it seems to make the principles of the law living and concrete, and to immensely aid the student to assimilate them. He sees them grow and sees them practically applied to more and more intricate and difficult facts, and observes their practical use. The general rules of law, formulated as abstractions, are difficult to remember or comprehend, and yet more difficult to apply until, as by this system, the student comes to know them "from their youth up." This method of teaching law is kindred with the best method of teaching other sciences and the more we investigate the more we discover the wonderful parallelism in all science and all good methods.

Too often the dulllest and most repellant reading in any branch for a beginner is a so-called "Elementary work." The generalizations there displayed are the last results of extended study and

comparison. The author himself could not understand them but for the antecedent study of the details on which they rest, and the unhappy beginner who is called on to digest the condensed extract of a score of cases in a rule of ten lines, is as badly off as the patient who is compelled to swallow the extract of one hundred pounds of beef in a pill of twenty grains. Food cannot be permanently supplied in that way, neither can instruction. The normal stomach and the normal mind are constructed to thrive better when they themselves in great part condense and digest the nutriment which they require.

For instance, a beginner reads *Carwardine's case*<sup>1</sup> where the brother of a murdered man offered by a printed handbill a reward of 100 pounds for information leading to the conviction of the murderer. A wretched woman, having been beaten by a male companion so that she believed herself dying, partly to ease her conscience and partly in revenge (a truly feminine combination of motives) gave information which led to the conviction of her assailant of the murder in question. She claimed the reward. It was refused. She sued for it and the old English court of King's Bench awarded it to her, Chief Justice Denman holding the offer was made to all the world, and she had brought herself under its terms, whatever her motives, and could recover as on a contract. Then the student passes on down the line of law-making cases on the subject of offer and acceptance, until he considers a case decided by our own Wisconsin court where a husband,<sup>2</sup> finding a hotel in flames and his wife on the third floor with her escape cut off by the fire, cried out, "I will give \$5,000 to any person who will bring the body of my wife from that building, dead or alive." The foreman of the local fire department thereupon, at imminent peril to his life, entered the building and succeeded in reaching the unfortunate woman. He found her already suffocated and lifeless, but succeeded in rescuing her body and restoring it to her husband. He asked the reward, but the husband refused it claiming that the foreman had done no more than his duty, and moreover had given no notice

<sup>1</sup> *Mary Ann Williams v. Wm. Carwardine*, 4 B. & A. 621; King's Bench, 1833.

<sup>2</sup> *Reifs v. Page*, 55 Wisconsin, 496, decided 1882.

that he accepted the offer. Our Supreme Court held that the foreman went beyond his duty when he entered the flames at the peril of his life, that his act accepted the offer, and decreed to him the promised reward.

When the student has read this sequence of cases and discussed them zealously with his fellows and his instructor, he certainly has a hold on the law of "offer and acceptance," that it is difficult to get from the study of these cases by any one else, however neatly that other person may state the rules derived from them.

So much for the preparation of the lawyer. A word now as to one or two indictments brought against him.

In his address as President of the American Bar Association, delivered in 1889, the late David Dudley Field, called the greatest codifier since Bentham, said that it was difficult to make an exact computation of the number of lawyers in the United States, but he estimated it at 66,000 in a population of 60 millions, and he pointed out that France with a population of 40 millions has 6,000 lawyers and 2,400 other officials who do the work of attorneys with us. Germany, with a population of 45 millions, has in the same category 7,000, so that he adds "the proportion of the legal element is in France 1 to 4762, in Germany 1 to 6423, in the United States 1 to 909." But the census of 1890 shows that he much underestimated the number of lawyers in this country, there being 89,630 instead of 66,000, fully one-third more, so that instead of there being one lawyer to 909 persons, as estimated, there was by actual computation, one lawyer to every 699 persons. I have only to say that this extraordinary preponderance is the result of the laws, apparently, of supply and demand freely operating, and that it is largely accounted for by the fact that our lawyers confine themselves less exclusively to the duties of the profession than do those of other lands, combining in most small communities the business of insurance, the care and sale of real estate, and money-lending with the pursuits of the law. As Mr. Bryce declares in contrast to the English custom, many members of our bar "are practically just as much business men as lawyers." Then the system of appeals and rehearings allowed by our law is peculiarly

extended, answering to the humane if exaggerated feeling dominant among us, which wishes every suitor or defendant to be fully heard and reheard and again reheard, and which is in marked contrast with the apparent purpose of many foreign tribunals to even harshly abbreviate hearings and often to compel convictions. Then, too, the enormous participation of the American lawyer in public office tempts many to the bar and occupies a great number of those who have been called there.

As to the relative merits of the English and American practitioner, it is almost impossible to speak. Nothing could be less worthy of praise than the lower type of lawyer in the United States. It is not exacted or expected that he should be a gentleman, a man of education or intelligence, and the safeguards against dishonesty or bad character are almost as slight as against incompetency. A Western Chief Justice, however, recently said in my hearing, that an American lawyer of distinctly secondary rank in this country, had, when near fifty years of age, been called to the English Bar and been able thereafter to win, perhaps, the first place at that bar, if we may judge by the considerations of his fellows or by his fee book. He referred, of course, to the late Mr. Benjamin. No similar case of an English lawyer winning the first eminence at the American Bar is recalled, although now and then a like *boulversement* of literary rankings has been seen.

The most candid discussion of our bar by a foreigner of competence, if we may term an Englishman a foreigner, we find in Mr. Bryce's "American Commonwealth" and that accomplished writer is a barrister in full practice as well as a law professor, a privy counselor, and member of Parliament. After justly condemning our system of admission to practice, he says:—

"Notwithstanding this laxity, the level of legal attainment is, in some cities, as high or higher than among either the barristers or the solicitors of London. This is due to the extraordinary excellence of many of the law schools. I do not know if there is anything in which America has advanced more beyond the mother country than in the provision she makes for legal education." "Twenty-five years ago" (he wrote this in 1888) "when there was nothing that could be called a scientific school of law in England, the Inns of Court having practi-

cally ceased to teach law, and the universities having allowed their two or three old chairs to fall into neglect, and providing scarce any new ones, many American universities possessed well equipped law departments, giving a highly efficient instruction." "Even now, when England has bestirred herself to make a more adequate provision for the professional training of both barristers and solicitors, this provision seems insignificant beside that which we find in the United States, where, not to speak of minor institutions, all the leading universities possess law schools, in each of which every branch of Anglo-American law, *i. e.* common law and equity as modified by Federal and State constitutions and statutes, is taught by a strong staff of able men, sometimes including the most eminent lawyers of the State. Here at least the principle of demand and supply works to perfection. No one is obliged to attend these courses in order to obtain admission to practice, and the examinations are generally too lax to require elaborate preparation. But the instruction is found so valuable, so helpful for professional success, that young men throng the lecture halls, willingly spending two or three years in the scientific study of the law which they might have spent in the chambers of a practicing lawyer as pupils, or as junior partners."

Perhaps the critic suggests that Mr. Bryce so wrote in a work intended to have and which met with an enormous sale in the United States, but in his testimony before the Royal Gresham Commission, three years later, which was not for American ears or markets, he held up these law schools again as models, declaring that the plan of systematic teaching of law has proved so successful in the United States that he advocates it positively in England, and throughout the enormous mass of testimony by England's greatest judges, lawyers, and law writers one finds that no one questions the excellence or superiority of the American system of legal education. Mr. Dicey, Vinerian Professor at Oxford and Q. C., declared to the same commission: "The law schools in America possess a reputation which is unlike anything which is possessed by any law school here."

Sir Frederick Pollock, Corpus Christi Professor of Jurisprudence at Oxford, said that "the American law schools have convinced the profession there that they do teach law in an efficient way, in a way which makes a man not only a better instructed lawyer, but a better practical lawyer."

A most pointed comment on law school and office education in the United States was heard when, at the meeting of the American Bar last August, Mr. Austin Fox of the Board of Law Examiners of New York reported that the Board had examined 1,050 applicants, 793 of whom had had law school training and the rest office training of at least three years. Fourteen per cent of the law school men failed to pass and twenty-six per cent of the office men; a difference of nearly 100 per cent in favor of the law schools.

In the interesting discussion before the Gresham Commission a defect is pointed out common to the legal instruction of both countries in that it omits all training in administrative and colonial laws, and in the law needed by persons entering the civil service, and the complaint is that the teaching of international law, useful for diplomats and all having international dealings, is but poorly provided for. The great school which is referred to as affording such instruction seems to be *L'Ecole Libre des Sciences Politiques* in Paris, founded by M. Boutmy, resting mainly on his great reputation, not aided by government or by endowments, but meeting a remarkable success. The Royal Commission in the scheme which it reports for the Gresham University provides that all these great branches shall be taught in the department of law, but it does not apparently seek to require proficiency in them as a prerequisite to a degree or for admission to the bar. The necessity for such branches has not been so keenly felt in America, where it has seemed folly to fit oneself for a public career so long as fitness would in very few instances aid one to get or assist one to retain public place.

With about 85,000 places now in the classified Federal civil service of the United States, however, and with the victorious march of civil service reform from its Federal conquests on to State and municipal victories, hardly less significant, the time is near, if not already here, when either our law schools or some kindred departments must provide the needed training for these great bodies of public servants who are in the future to be fitted for their work.

The more complete system of the French and German schools, in this respect, reflects an official service to which it is adapted,

where fitness earns a place and excellence secures regular advancement, although if we may trust Mr. Lecky, France is sadly relapsing in this respect at the present time. As has been well said, you would not stop to repair your plumbing while your roof was in flames, so with us the reform in the methods of getting into and out of the ministerial public service is the first crying necessity and the special training needed by those entering a reformed service will be provided rapidly thereafter.

The bar, however, must take a great share of responsibility, not only for what is praised, but what is censured in our laws and their administration, because of the predominant part it has had in making and in executing them, already generally alluded to. J. H. Benton, Jr., Esq., of the Boston Bar, in a remarkable paper read before the Southern New Hampshire Bar in 1894, has pointed out the increasing proportion the bar of the United States bears to the entire male population. Thus, in 1850 there was one lawyer in every 494 males; in 1860 one in every 484 males, and in 1870 one in every 479 males; in 1880 one in every 398. The computation of occupations was not completed for the census of 1890, when he wrote, but they have since been obtained by the present writer and the proportion there shown is one lawyer to every 358 males. This increase of the bar as compared to the male population is slightly but not materially affected by the fact that this last census shows 208 female lawyers licensed in the United States. It may be remarked in passing that the Benchers of the Ontario Law Society of Canada have within a few weeks passed rules admitting women to the bar, which require that the female barrister shall appear in court in a black dress under a black gown with white collar and cuffs and bareheaded. No such sobriety of dress is imposed on our 208 sisters of the profession, they having no official dress prescribed by rule or by custom.

The proportionate increase of the bar inclines the statistician to compute how soon this will become literally a nation of lawyers, as England has been called a nation of shop-keepers. Perhaps this extraordinary recruiting of the bar is in part a result of this same great participation in public affairs accorded to the bar in America. That, and the life freed from manual



labor, the livelihood earned by the head and not the hand, the social recognition accorded to the more successful lawyers, all these have lured the most ambitious and aspiring youth in throngs to the bar. There is always room at the top and the incomes of the leaders are still as great as those of the leaders of the much more limited English bar, but the earnings of a far greater number at the other end of the line afford a bare subsistence. The profession is an open one. Substantially no general education is demanded for admission to it in most of our States and a year's zealous reading in most States, two years in almost any, and three years, it is believed in any, will enable the ordinary man to come to the bar. When he has got there he merely stands with his fellows waiting for such employment as comes to him in a strenuous competition.

Numerous, too, as the lawyers are there are in the United States over 15,000 more physicians and surgeons than members of the bar. There are, as we have seen, substantially the same number of clergymen and lawyers, a man of God to offset every one of those disciples of the law, and there are more than five times as many teachers and professors as there are lawyers, and these last are largely maintained by the contributions of the public, exacted by law.

Perhaps part of the attraction of the legal profession lies in the unique position of our courts. Parliament is supreme in England and its acts can not be questioned by the highest judicial tribunal. The legislative and executive branches are not supreme with us. There is always a written constitution, State and Federal, with which their acts must be compared and by which they must stand or fall. This function of declaring them valid or otherwise on such comparison belongs to our courts and the bench is only, as it were, a committee of the bar assigned to a special, arduous but honorable duty; the judges are still of the brotherhood. This great concession of power to the judiciary, made as a new thing in the world by our Federal constitution, is a constant factor in maintaining the power and importance of both bench and bar. What is the greatest triumph in Mr. Joseph Choate's brilliant life? The winning of the decision from the Supreme Court of the United States against the valid-

ity of the income tax. A decision reached by a closely divided court in which one justice is known to have vacillated until the last. It utterly deranged the revenue of the nation and was an exercise of power undreamed of in English or European courts; yet it met with instant acquiescence from the government and the people. Such a success as Mr. Choate's could not come to an English lawyer. The great reputations at the English bar of to-day seem to have been derived mainly from sensational libel and divorce suits and none can originate from great constitutional discussions. The English judge is made important by wig and gown and javelin men and great state and income, unlike the judges of any other nation, but he has no such power as this which our courts, under the impulse of our bar, can exercise.

Lawyers are students of precedent and have been called by a bold and bitter tongue "the conservers of old abuses." So they have sometimes been, deserving the taunt of Voltaire and in this respect the clergy and all great seats of English learning have stood with them; but in a society where many supposed safeguards have been surrendered, where many untrained, shifting, passionate, dislocated elements are contending, this great conservative element plays no mean or useless part. Curiously enough, too, the bar furnishes not only a good deal of the ballast for the Ship of State but a large part of the sails as well. Many of the leaders of reform have been lawyers, as Bentham, Brougham and the humane Romilly in England, Sumner, Seward and the humane Lincoln in America. In the late constitutional convention of New York, which gave the guaranty of constitutional enactment to so many advanced reforms, 133 members out of 175 were lawyers.

When we turn back to review the course of the United States and consider the Declaration of Independence and conceive its boldness in the then world and its advancement, we must remember that twenty-five out of its fifty-six signers were lawyers. If we look to the constitution of the United States and allow the wisdom it evidenced and the safety it has assured, we must remember that thirty out of the fifty-five members of the convention that framed it were lawyers; that of the twenty-five presidents who have sworn to observe it, twenty were lawyers;

and of the twenty-four vice-presidents, eighteen have been lawyers; and the new incumbents are both gentlemen of the bar. Of 234 cabinet officers up to 1894, appointed by those presidents, 219 have been lawyers,—all but fifteen. That out of the 1,157 governors of States, Mr. Benton, who is still my authority, was in 1894 able to find the occupation of only 978, and 578, far more than half of those, were lawyers. That up to 1894 in the Senate of the United States, 3,122 senators had been seated and of these 2,068, more than two-thirds, were lawyers; in the Lower House of Congress 11,889 representatives had been enrolled, and of these 5,832 have been lawyers; that in some sessions as high as seventy-one per cent of both Houses have been lawyers, and the average has been fifty-three per cent; that *ex necessitate* the entire judiciary has been taken from the bar. When we consider all this we must confess that this nation in its foundation and in 120 years not without prosperity and achievement has trusted much to the lawyers. *Magna pars fui*, the bar can well say, "A great part of this I was."

One cannot conceive that such a reflection should be other than grateful to an American lawyer who loves his profession and his country alike.

A jurist has been well described as one who knows something of the laws of every country but his own, and there are those who in the same way know something good of every country, save their own, but that unhappy class is fortunately limited.

It plainly behooves an American lawyer to consider solemnly and gratefully the noble past of his country and the great participation of his profession therein. It ought not to be the parent of boastful vaunts on the part of the bar of to-day, but of earnest effort to prepare for and to fulfill in no unworthy manner the high and serious duties devolving upon it. Not to seek to become good lawyers, as the farmer said "by reading all the morning and talking all the afternoon;" not to be what Erasmus called the lawyers of England in Henry the Eighth's time "A most learned species of profoundly ignorant men;" but to be the enlightened and trained servants of justice, shaping the law to its needs, participating more than their fellow men, not only in administering, but also in creating and declaring the law, and

therefore as trustees for all deeply bound to seek the good of all. Said President Josiah Quincy of Harvard University in 1832 at the dedication of the Dane Law School, "What profession more deeply influences the condition of society, either for evil or for good?"

The bar ought to be zealous for wise law reforms, because they can hardly hope to prevail without its aid since other men trustfully look to it for guidance in such matters. As to these reforms the public is the client of the bar to which it owes a professional duty, faithfully to be performed. Large freedom and high civilization have never co-existed in the world without the great advancement of the profession which stands for the right of defense, for the systematic appeal to justice. We cannot read the future, its misty and shimmering veil deludes us only with a reflection of the past, but we may well believe that D'Auguesseau, when he called his brethren of the bar of France "*An order as old as the magistracy, as noble as virtue, as necessary as justice,*" spoke not for one, but for all times and all civilized countries, and most of all for the Great Constitutional Monarchy and the Great Republic, the homes, as they are, of sober and stable liberty.

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## THE LATE CONSTITUTIONAL CONVENTION AND CONSTITUTION OF SOUTH CAROLINA.

The convention was called to order September 10th, 1895, in the city of Columbia, by the Secretary of State, under authority of the Act of the State Legislature approved December 24th, 1894, directing the holding of a constitutional convention to frame a new constitution. The attendance was good, only two or three of the one hundred and sixty members of the convention being absent. Of these, six were negroes, one of them being a full black. The temporary chairman, Robert Aldrich, in his address on taking the chair, said that with the exception of the constitution of 1790 the one now to be framed is the only one that is entitled to be called the exponent of the untrammelled will of the people of South Carolina, meaning by this to exclude the convention of 1860 that carried the State into secession, and the convention of 1868 that was ordered by the President of the United States.

The Governor of the State, John Gary Evans, was elected president of the convention. He delivered a brief address, thanking the convention for the honor done him and touching upon the work before them especially with regard to the executive, the judiciary, homesteads, education, the suffrage and corporations. He reminded his hearers that it was their duty so to fix the election laws that their wives, children and homes would be protected and Anglo-Saxon supremacy preserved. The reading clerk was selected by the extremely practical but novel method of testing the capacity of the candidates by having them read aloud and then taking the vote of the convention.

The president was directed to appoint secretaries, clerks, door-keepers, pages and laborers for the convention, and also to appoint twenty-two committees on the principal parts of the new constitution. The next day the president announced these committees. The pay of the members was fixed at two dollars

a day and five cents mileage. September 12th, the Committee on Rules submitted rules for the convention and they were adopted. Drafts of new constitutions were received and were referred to appropriate committees for consideration. Many petitions were introduced for the creation of new counties, and prolonged debate followed. It was finally decided to create a new county to be called Butler County, to be cut off from Edgefield County, with an understanding that no other new counties would be created by the convention. The next day the convention changed the name of the new county to Saluda County. But surely the creation of new counties is not the proper work of a constitutional convention. It should establish a system under which they may be created by the General Assembly, or the inhabitants themselves, or both. In their report on the creation of this Butler or Saluda County, the minority of the committee on counties very properly reported the matter should be left to the General Assembly, but, as we shall see later on when examining other work of this convention, there was a dearth of lawyers or others who had made any study of the proper field of a constitutional convention, and the convention did many things that went beyond its proper sphere. The constitution as finally adopted, provides, in Art. VII, however, very properly, a general method under which the General Assembly may establish new counties, upon petition of one-third of the qualified electors within the area proposed to be set off as a new county. Undoubtedly the question of the lines of some of these counties has an importance not apparent to casual observation, for upon their location the preponderance of the negro voters in certain sections had an important political bearing.

On the evening of September 17, the convention listened to arguments presented by leading advocates of female suffrage, one of the speakers being Miss Clara M. Clay, a descendant of Henry Clay. Arguments on the same subject were also made before the committee to which it was referred. Various drafts of clauses for the new constitution relating to the suffrage were introduced. In the debates that took place it was openly avowed that the object of this convention is the retention of the suprem-

acy of political power by the whites, by retaining the suffrage in their hands, so far as is possible. This was also hinted at in the address of the president of the convention on taking the chair, already referred to. The problem is to adopt some method that will not conflict with the amendments to the constitution of the United States. To accomplish this, a modification of the Mississippi plan seemed desirable to the delegates generally. Briefly, under this system, all can vote who can read or write, or who can explain a clause of the constitution when read to them. It will be seen at once that under such a system all whites, however illiterate, can be admitted to vote, while all negroes, however literate or otherwise qualified, can be prevented from voting. It was freely stated in the debates that took place in this convention that an educational or other qualification was desirable, with the loophole attachment, as it was called, by which the illiterate whites might get through, while the negroes, even if qualified, might be kept out. Doubts, however, were expressed as to the constitutionality of such a system. It appeared later on that the subject gave the committee great difficulty and at one time they were evenly divided on the advisability of plans submitted. Incidentally it was proposed at one time that the members of the House of Representatives must be white, twenty-one years of age, citizens, and residents of the State three years, and of the county six months, but this was laid on the table by 102 votes against 25. One scheme to exclude negro voters consisted of the proposition to levy a poll tax of one dollar to be paid by all voters, and a further poll tax of two dollars, the non-payment of which should bar one from voting, but the scheme was too evidently conducive to fraud to meet with favor.

Propositions were submitted by the colored members forbidding discrimination against colored voters, but these were promptly tabled. It would not be easy to define a "colored voter," for delegate George D. Tillman contended, to the horror of the members of the convention, that there was not a full blooded Caucasian on the floor of the convention! One member stated that he was "profoundly moved by such a charge." The colored members spoke well and forcibly in opposition to any

discrimination in the constitution against their race, as regards suffrage. They were listened to courteously, but their propositions were promptly voted down. That the suffrage question was the main issue before the convention was freely admitted. Delegate B. R. Tillman even went so far as to say "that the question of suffrage and its wise regulation, is the sole cause of our being here." The noted colored delegate, Robert Smalls, ex-member of Congress, took the opportunity to defend himself and his associates for their conduct in the "carpet bag" frauds and other frauds of the reconstruction period. Delegate J. C. Sheppard also addressed the convention at some length on the same subject. Delegate George D. Tillman replied, admitting that after 1876 a compromise was arrived at, the Federal Government agreeing to stop all its pending election prosecutions and pardon all those who were in prison, and the State of South Carolina agreeing to pardon all Republicans convicted for crimes growing out of politics and to cease all further prosecutions.

Qualified woman suffrage was proposed as one way to retain the supremacy of the white race, but it was voted down. During the discussion of the Mississippi plan, one of the delegates, H. C. Patton, said: "We know it is the purpose of the proposers of the bill that it shall not be impartially enforced." After prolonged discussion, on the 2d of November the convention agreed to adopt the suffrage test recommended by the committee. Leaving out of account details not necessary to our purpose, the plan adopted is similar to the Mississippi plan in giving the right to vote to those who can read any section of the constitution or who can understand and explain it when read to them by the registration officer; but this is to be the law until January 1, 1898, only, after which date the test for registration is to be the ability to read and write any section of the State constitution, or the ownership and payment of taxes during the last year on property in the State worth \$300. Subsequently an important amendment was adopted,<sup>1</sup> providing that any person denied registration shall have the right to appeal to the courts for redress.

<sup>1</sup> Article II, Sec. 5.



Section 6 provides that conviction of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, house-breaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny, or crimes against the election laws, shall disqualify one from voting. The whole list is here given, to show that manslaughter does not disqualify one from voting under this constitution. It was proposed to include lynching, but this was voted down upon the ground that the penalty for lynching, as well as for murder, being death, it requires no specific disqualification from voting. But this overlooks the fact that there may be various minor forms of lynching that do not involve the death penalty. It would seem that under this constitution one in jail under sentence of death for lynching or for murder, would still have the right to vote.

The frequency of lynch law is evident from the necessity of making provision against it in this constitution. Article VI, Section 6, provides that if an officer have a prisoner in his charge, and through his negligence, permission or connivance such prisoner be taken from him and shall undergo death or bodily harm by a mob, etc., upon true bill found, such officer shall be deposed pending trial, and if found guilty, shall be ineligible to office unless pardoned by the Governor. This section further provides that in all cases of lynching where death ensues, the county shall be liable in exemplary damages of not less than two thousand dollars to the legal representatives of the person lynched; and the county shall have the right to recover the amount of such judgment from the parties engaged in such lynching. September 18th the convention met in great wrath, the members being in a frame of mind similar to that of the inhabitants of an angry beehive. They had taken umbrage at an editorial statement in one of the newspapers published in Columbia with regard to the result of a vote changing the name of Butler County to Saluda County, and the action thereon of the president of the convention. A resolution was offered "that the convention pronounce said editorial statement as being a malicious falsehood." As more than ten members objected to

an immediate consideration of this resolution, it went over, under the rules, and more moderate counsel prevailing the next day, it was voted, after several resolutions on the subject had been proposed, that the said editorial statement is unsupported by the facts and is untrue, is a reflection upon the honesty and integrity of the president of the convention and an insult to this body, and is an abuse of the privilege granted to the press in admitting its members to the floor of this convention. Sixteen members felt called upon to give the reasons for their votes. Thus, W. M. Fitch voted "no" because he did not believe the president should be put in the position of needing a resolution to affect his character, his high standing being personally known to him, and because this convention has no business to pass any resolution relating to a criticism in a newspaper. T. E. Dudley voted "no" because the president needs no vindication of his honest intentions, because the convention is not assembled to try cases of libel and has no right to waste the money of the people in advertising any newspaper, and because the precedent is dangerous to the harmony and peace of the convention, and the criticism of any paper should be treated with silent contempt. These are cited as examples of the sturdy common sense of members of this convention. Unfortunately the convention voted that no official stenographic report of their proceedings should be taken, and we are therefore deprived of the assistance such a report would furnish. We are obliged to rely largely for details upon the reports published in the daily newspapers.

Article 1 — the Declaration of Rights — needs but little comment. It contains the usual provisions of Bills of Rights concerning the people as the source of political power, freedom of religious worship, freedom of speech and of petition, the right to jury trial, to the writ of *habeas corpus*, etc. In the debates on this article, many sections were objected to on the ground that they are already embodied in the constitution of the United States and therefore their repetition in the State constitution is unnecessary. But this overlooks the fact that unless they are repeated in the State constitution they would fail to be in effect in many cases occurring in the State in which the jurisdiction of the United States could not be invoked, for, generally speaking,

the statement of rights in the constitution of the United States applies only in the case of prosecution in the United States courts.

Section 11 provides that no person shall be elected or appointed to office for life or during good behavior, but for some specified time (except notaries public and officers in the militia). It is difficult to conceive what led the convention to adopt such an extraordinary principle. The same section also provides that whoever fights a duel or sends or accepts a challenge or aids or abets a duel, shall be deprived of holding any office of honor or trust and shall be otherwise punished as the law shall prescribe. It is good to find that public opinion, as thus reflected in the organic law of the State, is now against dueling and lynching.

Reflecting the opinion of some jurists that it is a dangerous thing to concede the power to any court to prevent a crime by a writ of injunction, it was proposed to forbid the use of this writ in such cases upon suit brought by the State. But after much debate this proposition was rejected. Section 19 of Article 1 provides that the power to punish for contempt shall not extend to imprisonment in the State penitentiary, a very proper restriction, since in most cases there is no moral turpitude involved in cases of contempt and unless there is, there is obvious impropriety in imprisoning one who is in contempt of court, with murderers and thieves.

Section 28, after declaring all navigable waters of the State to be public highways, and free, also provides that no tax, toll, etc., for the use of the shores or any wharf thereon, shall be imposed, unless authorized by the General Assembly. But if any one has already acquired title to such property, is not this clause open to the objection of taking private property for public use without compensation?

The effort is made to restrict the length of sittings of the General Assembly, by providing, in Article III, Section 9, that after the next four sessions thereof the members shall not receive any compensation for more than forty days of any one session. The General Assembly is to meet annually. The fear of undue or unwise exercise of power by the Assembly is manifest in the minute provisions made in Sections 17 to 24, as to the style of all laws,

that each one shall relate to but one subject that shall be expressed in the title; that every act and joint resolution shall be read three times, shall have the great seal of the State affixed to it and shall be signed by the President of the Senate and the Speaker of the House; in determining in the constitution the rate of mileage; that no General Assembly shall increase the pay of its own members; that adjournment for over three days or to some other place must be by consent of both Houses; that each House shall keep a journal on which the yeas and noes shall be entered at the desire of ten members of the House or five of the Senate; and that the session shall be open unless the House requires secrecy. (Why the House and not the Senate or why not leave it to either as to their own session?) Many of these provisions obviously relate to the management of its own business by the General Assembly and are out of place in a constitution. They would seem to be dictated by the apprehension that the legislature will exceed its proper functions unless prevented by the organic law from doing so. Are these apprehensions the result of improper performances by legislatures in the past, or because with the increase of knowledge in the community, dangers not thought of by our forefathers are apparent, and an effort is thus made to guard against them?

Under the influence of these apprehensions we find the General Assembly is forbidden under Section 34, Article III, to enact any local or special law, to change the names of persons or places; to lay out, etc., any highways; to incorporate cities, towns or villages, or to amend their charters; to incorporate educational, religious, charitable, social, manufacturing or banking institutions not under the control of the State, or to amend their charters; to incorporate school districts; to authorize the adoption or legitimation of children; to provide for the protection of game; to summon or impanel grand or petit jurors; to provide at what age citizens shall be subject to any public duty; to determine the compensation of any county officer (except by a law in proportion to the population and services rendered).

This list is given in full, for it is curious both on account of what it contains, as well as what it omits. Clause XI provides that in all other cases where a general law can be made applica-

ble, no special law shall be enacted. But who shall judge whether a general law can be made applicable? Manifestly, to complete this scheme, and to prevent abuse by the legislature, the power should be expressly vested in the judiciary. Clause XII of this section then goes on to provide that the legislature shall enact general laws on these subjects which shall be uniform in their operations. But then comes the proviso that nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws. Does not this open the door to a virtual repeal of the preceding inhibitions?

The same idea of limiting the power of the legislature is shown elsewhere in this constitution. Thus, Article IX, Sections 2 and 9, provides that charters shall be granted, changed or amended only by general laws (except, etc.), but a special charter may be granted after the above inhibition is dispensed with by a two-thirds vote.

An instance of the petty detail so often found now in State constitutions is to be found here in Article IV, Section 21, making it imperative upon the Governor to reside at the capitol, except in cases of contagion or the emergencies of war, but during the sittings of the General Assembly he shall reside where its sessions are held.

Article V, on the Judicial Department, and Article VI, on Jurisprudence, are very long and contain many minute details more properly falling within the province of a legislature.

One noteworthy change is made in Article VI, Section 3, ordaining a uniform mode of pleading without distinction between law and equity.

It was proposed to give any city or town the power to form, alter or amend its own charter through a board of five freeholders elected for that purpose, subject to the ratification of the electors. This very proper extension of the right to home rule failed to pass, however.

The National League for the Protection of American Institutions, petitioned the convention that a clause forbid any establishment of religion or the prohibition of the free and full exercise of any form of religion. It was stated that twenty-five

of the forty-four State constitutions already contain similar provisions. An unfavorable report was submitted and adopted on a clause to prohibit the intermarriage of blacks and whites.

September 23rd, the extraordinary proposition was proposed for insertion in the constitution that no man should be allowed to marry until examined by a Board of Physicians and pronounced to be free from all diseases that would render him unfit to be a husband or a father.

An ordinance was proposed forbidding the granting of divorces, continuing the existing law of the State, but for the sake of interstate comity, recognizing the validity of divorces granted in other States, if either party was actually a resident and citizen of such State.

Later on, Senator Tillman read a very powerful and touching letter from a divorced woman, in consequence of which a clause was adopted admitting the validity of divorces granted in other States, but with the strange limitation that this is to apply only if the marriage be performed in South Carolina, and one of the parties live in another State.

But even this failed of final adoption, and Section 3, of Article XVII, of the constitution, now reads: "Divorces from the bonds of matrimony shall not be allowed in this State." This does not apparently include the non-recognition of divorces granted in other States. But if it does, such denial of the validity of divorces granted elsewhere probably renders the clause unconstitutional and therefore void (see Section 1, Article IV, of the constitution of the United States).

Notwithstanding the growth of a better humanitarian spirit, after debate in which it was declared to be the will of the people of the State, the chain gang system was perpetuated in Sections 6 and 9 of Article XII.

Article XXII, Section 9, does away with the common law as regards the property rights of married women. In consonance with modern ideas it gives to married women the same power to contract and to be contracted with as if unmarried.

It was proposed to abolish the right of dower in all lands alienated by the husband during the life of the wife, but no action was taken, the matter being left to the legislature.

It certainly would seem to be the function of the legislature and not of a constitutional convention to provide a scheme for codifying the statutes! See Article VI, Section 5. And the convention wasted much time in a discussion as to the compensation of the codifiers.

Article VII on counties, etc., contains many excellent provisions along with provisions that should not incumber a constitution. It provides for the formation of new counties by the General Assembly upon petition and a vote by those affected.

An interesting debate occurred on the subject of town government, the New England system being explained and extolled by delegate George D. Tillman. He argued strenuously for its introduction into South Carolina. It was stated that twenty-five towns have been incorporated every year for the last twenty-five years. This shows a remarkable disposition on the part of South Carolinians to incorporate themselves under the township system. Article VII, Section 11, gives power to the legislature to organize townships and to provide a system of township government — probably as the result of this discussion and explanation.

A very proper limitation is placed by this Constitution upon the exercise of unlimited or oftentimes capricious power of the Legislature in granting or amending charters whether quasi-public or private. Thus Article VIII, Sec. 1, provides for the organization and classification of municipal corporations by the General Assembly under general laws. But a majority of the electors in the city or town must give their consent.

The power to continue the peculiar "Dispensary Law" of the State is given in Art. VIII, Sec. 2.

Article VIII prohibits prize-fighting. Section 7, Art. XVII, prohibits lotteries, their advertisement or the sale of lottery tickets. It is good to note the growth of a sound public opinion on these subjects, thus made manifest and strengthened through enactment in the organic law of the State.

Article IX on Corporations is long, and reflects current public opinion on the necessity of limitations on their powers as well as on the powers of the General Assembly. In addition to the now usual provisions against the grant of special charters, the effect of the Interstate Commerce Act is shown in Section 5,

prohibiting discrimination in charges, etc. Section 7 prohibits railroad and telegraph companies, etc., from consolidating their stock. All railroads in the State must be incorporated in the State (Sec. 8).

Section 11 directs the General Assembly to provide by general law for the election of directors, etc., of all corporations, so that minority representation shall be secured. The result of this victory of the advocates of such a system will be watched with interest.

It provides that, under such a law to be passed by the General Assembly, each stockholder in a corporation may cast as many votes as the number of shares he owns multiplied by the number of directors, casting such vote for any one candidate or distributing it among two or more candidates.

Changing the rule of the common law, Section 16, of Article IX, gives a right to employés of railroad corporations to sue the corporation for injuries, the result of the negligence of a fellow-servant. The objection was well raised that this is legislative work rather than the proper work for a convention, and is, moreover, class legislation. Nevertheless the section was adopted. But the General Assembly is authorized at the end of the section, to extend this remedy to any other class of employés.

The excellent feature is adopted in Section 13, Article X, of directing the adoption of but one assessment of all property for taxation, whether by the State, county, school or municipality, and this assessment shall be that made for State taxes by the State.

Article XI, of Education, provides a complete educational system from the district school to the university. Separate schools, even normal schools, are provided for the colored race, and thus a due regard is manifest for their education. Full debate was had in the convention as to State aid to the colleges, it being urged that State aid should be extended even to denominational colleges, but Section 9 wisely provides in the fullest manner that the property or credit of the State shall not be given nor used in aid of any church or denomination.

The want of wisdom in putting into a constitution details that



should be left to the legislature is illustrated here by the provision that the General Assembly may provide for the maintenance of three colleges, named. Should a new college or university be formed, no matter when, that should receive State aid, as by a gift of land for a site, the constitution must first be amended.

Section 12 provides that all the net income to be derived by the State from the sale or license for the sale of liquors, shall be applied annually to the support of the public schools.

The convention adjourned *sine die* December 4th, 1895, and the new constitution went into effect December 31st, 1895, without submission to the people.

One of the most noticeable features of this convention and its work is the want of knowledge shown of the proper sphere of a constitution and of the difference between what should be put into the constitution and what should be left for the legislature to enact as statutes. No one seems to have pointed out that a constitution should contain only the great fundamentals of the organic law, leaving the details of law-making to the legislature. The members of this convention failed to grasp this principle and therefore their work included too much mere law-making. It was even moved by one member "that there shall be no session of the legislature this year, but the convention shall do its work in its place." It would have been but a step further for the convention to continue indefinitely in session and to carry on the government of the State.

Equally out of place was the action of this convention in changing the date of meeting of the legislature from November 26th to January 14th following. How can an ordinance<sup>1</sup> passed before a new constitution is adopted, change the constitution already in force? It was the duty of the members of the General Assembly, under their oaths of office, to meet at the time and place fixed by law, and this convention had no power to alter this duty. The old constitution and the laws thereunder remained in full force and effect until the new constitution was adopted as a whole and went into effect. Until this was done, it seems clear that

<sup>1</sup> See also Article III, Section 9, to the same effect.

an ordinance of the convention passed before the new constitution was adopted, postponing the time of meeting of the existing General Assembly, was absolutely null and void. It is easy to see that this might give rise to important questions of law.

Equally wrong was the action of the convention in establishing a new county, as was done, as already explained. This also was done, not in the constitution itself, but by an ordinance, thus perverting the proper function of ordinances passed by constitutional conventions. Their proper object is the settlement of business connected with the work of the convention or that which is ephemeral, and hence should not be put into the constitution, which is to last indefinitely. A constitutional convention has no business to undertake legislative work and to enact new statutes under the guise of ordinances.

Bearing this distinction in mind, the ordinances passed by the convention authorizing the auditing of the bills for printing for the convention, fixing the pay of the members and employes, providing for indexing, etc., the constitution, were proper and right, but the ordinances passed establishing a new county, postponing the session of the General Assembly, providing for the payment of interest on the public debt, were improper and wrong. Right here we have an illustration of the error made by the convention in postponing the session of the General Assembly from November to January, for this very postponement made it necessary for the convention to arrange for the payment of the interest on the public debt, falling due January 1st. Had the General Assembly met in November, as was its duty, it would have provided for this payment, and the constitutional convention would not have been obliged to usurp its functions.

The constitution also passed six ordinances declaring that nothing contained in this constitution shall inhibit the General Assembly from enacting laws necessary to carry into effect subscriptions to the capital stock of certain railroads already voted for and authorized by the qualified voters of the six counties named. This may have been merely excess of caution but it was clearly superfluous, for the convention could not impair the obligation of any existing contract. But no one pointed this out. The convention seems to have proceeded upon the theory

that it was supreme and that whatever it did was law. If constitutional conventions in general proceed in the future upon this theory, a new danger awaits us, and hence the propriety of this note of warning. There is no more critical period in the life of a State than when it is about to frame and adopt a new charter of government. The work should be done by those qualified to do it and among them should be at least some jurists and lawyers with a knowledge of the proper function of a constitutional convention.

Equally in violation of the principles that should govern a constitutional convention was the adoption of this constitution and the declaring it operative as the supreme law of the State, without submitting it to the vote of the electors. It is true this has been done in other States also, but none the less is it a reprehensible custom and one that shows an ignorance of the proper procedure that should be followed in such cases. Judge Jameson in his great work on Constitutional Conventions has well pointed out the impropriety of this course and it is one that an enlightened public opinion should frown upon. A constitutional convention is not the people in convention assembled. It is only a meeting of representatives of the people, it being manifestly impossible for the people to assemble in convention. The people, by the vote of the electors, should have an opportunity to accept or reject what their representatives have proposed as their form of government.

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## COURTS VERSUS CLEARING HOUSES.

When confronting the contract of indorsement, the modern clearing house official does not seem to understand "where he is at, nor why he is there." He seems prone to ignore the obvious distinction between general indorsements, which transfer ownership of a fund, and restrictive indorsements, which retain ownership of the fund, while declaring express trusts. He fails to comprehend that every general indorsement involves two contracts: a contract of sale, which is governed by common law rules; and a contract of indemnity, which is the creature of the law merchant. And because courts observe this broad distinction, and adhere closely to rules of the law merchant, clearing house people seem disposed to misrepresent the courts, and even go so far, in some instances, as to question judicial integrity. Some notable instances of this unwise propensity occurred during the past year. But there is no necessity for any misunderstanding; nor is there any excuse for assailing the courts. The plain truth is, not that courts have changed their views, but that clearing houses have sought out new and strange devices of a character unknown to the law merchant; and have attempted, against the protest of courts, to fasten their new, untried inventions upon the business world. Since the advent of Lord Mansfield, the legal character of the contract of indorsement has not changed; because the reasons which underlie that contract are, in these closing years of the nineteenth century, precisely what they were five generations ago.

And yet, in the midsummer of 1896, the country was flooded with circulars, emanating from clearing house sources, which conveyed an impression that recent decisions by the highest courts had either reversed or seriously impaired the ancient rule. Many of those circulars hinted at recent decisions by the New York Court of Appeals. Some alleged newspapers took up the cry, but credited the recent decisions to the United States Supreme Court. All this promiscuous literature was misleading,

because neither of those courts has taken any new departure. The legitimate result was to awaken, among individual bankers and their patrons, a feeling of needless anxiety and distrust, utterly needless, because the law of indorsement has remained unchanged for generations past, and is likely to remain undisturbed for generations to come. Five cases, covering almost every conceivable phase of the law of indorsement, were reported during the year 1896.<sup>1</sup> One legal principle which governs all these cases is simply this: Every contract of indorsement must be construed in strict accordance with the terms of that indorsement; restrictive terms must not be enlarged, to convey ownership of the fund; nor can general terms be so restricted as to show the relation of principal and agent. The case first in order of time, and the one which has occasioned some unjust comment, is *Crane v. Bank*, decided February 17, 1896. The undisputed facts were substantially these: March 13, 1891, the Anglo-California Bank, of San Francisco, made its draft on the Fourth Street National Bank, of Philadelphia, in these terms: "Pay to the order of Charles Early, nineteen hundred and ninety dollars." Five days later, Early indorsed, to the Keystone Bank, of Philadelphia, in these terms: "Pay to the order of John Hays, cashier for account of Crane, Parris & Co., of Washington, D. C." Bearing these two indorsements, this paper reached the Keystone, by due course of mail. Both the Keystone and the Fourth Street then belonged to the Philadelphia Clearing House Association.

On the morning of March 20, 1891, when that association opened for business, this draft was presented by the Keystone, and was duly honored by the Fourth Street. There was then a clearing house balance against the Keystone of more than \$47,000. This balance it was unable to pay, and, therefore, instead of "clearing" on that day, as other banks did, its doors were closed and government officials took possession. Under those circumstances, the clearing house assumed to pocket the proceeds of this draft, and credit the same to the Keystone,

<sup>1</sup> *Hutchinson v. Banking Company* (N. C.), 25 S. E. Rep. 971; *Bank v. (N. Y.)*, 44 N. E. Rep. 775; *Boykin v. Johnson* (N. D.), 69 N. W. Rep. 49; *Bank*, 118 N. C. 568; *Bank v. Bank* *Crane v. Bank*, 173 Penn. St. 566.

instead of remitting to the real owners. Crane first sought to collect from the clearing house officials; but the result was to develop the fact that the Philadelphia Clearing House Association, like the Detroit Lime Kiln Club, has no standing before the courts, being neither a corporation, a joint-stock company, nor a partnership. This suit was then brought against the original drawee; the latter resisted, alleging that it had already paid by turning the money over to the clearing house. Speaking for the full bench, Justice Williams characterized that defense thus: "Plaintiffs were, on March 19th, owners of this draft. On that day they indorsed specially to the Keystone, stating, in the indorsement, that its purpose was the collection of the amount, for their own credit. The effect of that indorsement was to make the Keystone the agent of the indorsers, for the single purpose named. The title to the draft passed, only so far as was necessary for the purpose of the agency created by the indorsement; ownership of the proceeds remained all the while in the indorsers. This draft had not been collected, and remained the property of Crane, as fully as before. The clearing house had no right to demand or to receive the amount from the drawee, unless it did so in completing the day's clearing for the Keystone; and, if it had demanded and received it for that purpose, it would have held the money for the owners of the draft, and would have been accountable to them for it. But it did not assist the Keystone to clear. It demanded and received the amount of this draft from the defendant, and appropriated it to the payment of the Keystone's indebtedness to the clearing house. This is the 'payment' set up. It is a payment to one who was a stranger to the draft, who had no interest in the proceeds, and no authority to act as agent for the owners. No reason has been suggested for supposing that the clearing house had acquired, or could acquire, a title to this draft, by the mere accident of having it in possession. If the Keystone had attempted to make title to the clearing house, by indorsing the draft over to it, that would have been wholly inefficient, because notice of the limited interest of the bank was written into the indorsement, and any party taking as indorsee of the bank would be bound to take notice of its want of title and its inabil-

ity to confer one. The drawee had notice, therefore, by the indorsement, that the clearing house had no title, and that payment to it would be at the risk of the payor."

This opinion, it will be observed, is directly in line with that of Justice Miller, in *Sweeney v. Easter*,<sup>1</sup> decided in December, 1863. In that case, it will be remembered, Judge Miller said: "The words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them; and warned the party that (contrary to the purpose of a general indorsement), this was not intended to transfer ownership of the note or its proceeds. This indorsement was not intended to give currency or circulation to the paper. Its effect was just the reverse. It prevented the circulation of the paper, and its effect was limited to an authority to collect it."

To the careful student of jurisprudence it will appear obvious that Judge Williams is not only directly in line with Judge Miller but that he is, in fact, bulwarked on every side by an overwhelming array of judicial authorities. And yet, in thus turning the judicial searchlight upon the peculiar methods of those clearing house people, and in thus standing by the ancient landmarks of the law merchant, Judge Williams had the misfortune to call down, upon his devoted head, the wrath and scorn of the *Banker's Magazine*. Considering the bare modicum of useful information which it possessed and could impart, that magazine, in its issue of July, 1896, devoted a generous share of its editorial space to a criticism of this Pennsylvania decision. That editorial deserves to be rescued from the obscurity where, for six months, it has reposed, and given the widest possible notoriety, because it is a remarkable document; remarkable, alike, for what it contains and for what it does not contain, for its concealments and for its disclosures.

Here it is: "The decision is important in its consequences, as it makes banks which have paid a draft through the clearing house liable to pay it a second time, if the bank in which the check was deposited fails before it pays the depositor the amount

<sup>1</sup> 68 U. S. 166.

of the draft. The facts were that Crane, Parris & Co., sent a draft for \$1,990 to the Keystone Bank, for deposit and collection. On the morning of March 20, 1891, at half-past eight, the Keystone sent its clerk to the clearing house with a package of checks and drafts on other banks, amounting to \$70,005.46. The other banks presented checks and drafts on the Keystone, for \$117,035.21, thus making the Keystone a debtor, in exchanges, for \$47,029.75. At half-past ten, that morning, the Keystone was closed by the bank examiner, and the balance due by it was not paid. The other banks were compelled to pay the clearing house manager the amount of checks held by the Keystone on them, and of course did not receive payment of the checks for \$117,035.21, which they held on the Keystone; so that they paid out \$70,005.46 which they owed, and lost \$117,035.21 which was due to them. Among the checks on the Fourth Street presented by the Keystone, was the check deposited, in the Keystone, by Crane, Parris & Co., and the proceeds of that and other checks passed through the clearing house by the Keystone were used in paying the indebtedness of the Keystone to the other banks. Crane, Parris & Co., first sued the clearing house committee, for the amount of their draft, but the court decided that the clearing house committee merely furnished a place for making exchanges, and was not the collector of checks and drafts, and consequently was not responsible. Then Crane, Parris & Co., sued the Fourth Street, and obtained a judgment which compelled the bank to pay the draft on it a second time. The justice of this decision is not apparent."

Having thus distorted the facts, that editorial next proceeds to crucify the law, thus: "1. The law is that when a person deposits a check or draft, or leaves it for collection, the bank becomes the owner of the check or draft, and is liable to the depositor for the amount of it when collected. The bank owns the check and owes the amount of it, when collected, and the bank selects the mode of collecting the check. The transaction is not a bailment, where it is expected that the thing deposited is to be returned." 2. The Fourth Street had actually paid the draft sued upon, in the manner and through the agency selected by the Keystone. 3. Had the balance of exchange, on the day



the Keystone failed, been in its favor, no one would contend that the Fourth Street would have been liable to pay the draft a second time. 4. The Keystone was solvent, when the exchanges were made, and the balance struck. Yet, because the Keystone did not pay the balance due by it, the Fourth Street, which did pay, is required to pay a second time. A logical result of the decision is that every depositor in the Keystone Bank, whose checks were paid through the clearing house that morning, may sue the banks which have paid them, and compel said banks to make payment a second time. A decision which produces such results cannot be right."

Extended comment on the foregoing would be clearly a work of supererogation. The journal in which it appeared as an editorial is now in the fiftieth year of its existence; but if the above is a sample of the mental sustenance it has generally dealt out, it is not surprising that its patrons often find themselves in the meshes of the law. The record in this Pennsylvania case shows a deliberate breach of trust, connived at by clearing house officials, a fraudulent conversion of money known to belong to a Washington firm. That record shows a deliberate conspiracy of which this clearing house was the instigator and the beneficiary, the Keystone bank a mere scapegoat, and this Washington firm predestined victims. A more palpable skin-game than the one thus perpetrated upon Crane, Parris & Co., could not have been worked by these clearing house gentry, even had they been lineally descended from those thieving money-changers once scourged out of the temple. And the soup of which Oliver Twist so inconsiderately demanded a further supply, was, I submit, no more transparent, no less substantial, no thinner, than the defense of those conspirators, thus ostentatiously paraded by the *Bankers Magazine*. Its pretended statement of facts is false and misleading. It alleges that the paper was sent to the Keystone "for deposit and collection." The unquestioned fact is that paper was sent "for collection and remittance," as in one of the North Carolina cases, *infra*, and was indorsed to that effect.

The editorial, both in its statement of facts and in its conclusions of law, utterly fails to distinguish between restricted

and general indorsements. And a careful perusal of those legal conclusions will go far towards convincing the unprejudiced reader that, down on Manhattan Island, law books must be largely made up of what that editor does not know about the jurisprudence of his country. Again, that journal plumes itself on the fact that, to borrow its own words, "all the latest decisions affecting bankers, rendered by the United States courts, and State courts of last resort, will be found in the Magazine's Law Department, as early as obtainable." Yet, notwithstanding that high-sounding flourish, readers of that journal will search its pages in vain for any mention of the New York, North Carolina and North Dakota cases above cited, each of which directly affects the banking interest, each of which discusses the contract of indorsement, and each of which is directly in line with the opinion of Judge Williams. Turning away, for example, from the six-foot boiler and ten-foot whistle of the *Bankers Magazine*, to an examination of these recent cases, we shall find four different opinions, each written by a different judge; we shall find that neither of those opinions refers to either of the others; we shall find the different opinions so near together, in point of time, that neither judge could have known what was said by any other; we shall find each of these four judges in accord with Judge Williams; we shall find the five judges, representing New York, North Carolina, North Dakota and Pennsylvania respectively, actually keeping step, as if they really touched elbows. And the reason for that consensus of opinion is obvious — those five judges have camped on the trail of Mansfield and Marshall, of Kent and Story, of Bleckley, Black and Cooley. In their different and widely separated jurisdictions each of those judges seems disposed to heed the injunction, "*Remove not the ancient landmark which thy fathers have set.*"

Three months before the publication of that editorial criticism came the case of *Boykin v. Bank*,<sup>1</sup> decided March 31, 1896, and being one of the several cases growing out of the failure of the Bank of New Hanover, at Wilmington, N. C. Boykin sued the Bank of Fayetteville, to recover the proceeds of a draft drawn

<sup>1</sup> 118 N. C. 568.

by him and indorsed "for collection and remittance," to the New Hanover. The indorsee sent the paper to defendant; the latter made collection and credited the proceeds to the insolvent New Hanover. Speaking for the full bench Justice Clark said this: "The indorsement 'for collection' was notice to defendant that plaintiff was owner, and that the Wilmington bank was merely an agent. If defendant had actually paid the money, to such agent, before any notice from the principal, it would have been a discharge of liability; but there has been no payment, simply an entry on the books, to the credit of the Wilmington bank, which was an authority to that bank to draw; but this could be corrected, by a counter entry and by notice to the Wilmington bank that the money had been paid to the principal. As the latter bank has become insolvent, and has gone into liquidation, it was proper that the principal should intervene, and not permit the fund to go into the hands of his insolvent agent. Had defendant refused to pay the money over to the Wilmington bank, it is settled that the latter could not maintain an action to recover from defendant, but plaintiff alone could maintain such action, being the real party in interest."

The case next in order of time was *Hutchinson v. Banking Company*,<sup>1</sup> decided by the New York Court of Appeals, October 6, 1896. The cases thus far quoted from are instances where, while the indorsement was restrictive in terms, parties claiming under that indorsement claimed ownership of the fund; but in this New York case we find those conditions exactly reversed. Here the indorsement was unrestricted in terms, yet the indorser sought to show by parol that his indorsee was merely a collecting agent. These were the facts: The suit arose from a draft made by the Interstate Mortgage Trust Company, of Greenfield, Mass., on the Packard National Bank, also of Greenfield, payable to the order of one Kaulback. That draft was three times indorsed, thus:—

"Pay to the order of Hutchinson." (signed). "Kaulback."

"Pay to Patton, or order," (signed), "Hutchinson."

"For deposit, to the credit of Patton." (signed), "Patton."

<sup>1</sup> 44 N. E. Rep. 775.

Patton deposited this draft, bearing these and no other indorsements, with defendant, and was credited therefor on his pass book. Defendant then indorsed the draft "for collection," over to the First National Bank, also of Greenfield. The paper was promptly honored, and defendant received the proceeds thereof by due course of mail. Meanwhile Patton had made an assignment, being wholly insolvent, and defendant being one of his principal creditors, appropriated such proceeds, and gave him credit therefor. At this juncture Hutchinson came forward and demanded such proceeds from defendant, alleging, as the reason for such demand, that he really owned this paper, at the time it was deposited with defendant; that he never sold it to Patton, but merely intrusted it to him for collection, and with verbal instructions to deposit the draft with defendant, for collection. In other words, Hutchinson sought, by parol, to contradict and vary the terms of his written contract; and to show that his indorsement, though in general terms, was designed to be restrictive in its effect. For most obvious reasons he could not recover, against a bona fide holder; because every party to commercial paper is bound by the terms of his contract. In sending the plaintiff out of court, empty-handed, Justice Bartlett closes a very able opinion, thus: "Hutchinson made this result possible by indorsing the draft generally, when ordinary prudence dictated that he should have indorsed it for collection."

Next in order of time comes *Bank v. Johnson*,<sup>1</sup> decided by the Supreme Court of North Dakota, November 14, 1896. The facts were these: Geschke, the owner of a certificate of deposit, issued by the Lloyds National Bank, of Jamestown, N. D., indorsed it thus: "Pay, to the order of the Bank of Anacortes, for collection account of Geschke." The Anacortes indorsed "for collection" to plaintiff bank. Plaintiff sent it to the Lloyds, and the latter responded by sending its draft on a St. Paul bank. On receipt of such draft plaintiff credited the amount thereof to the Anacortes, and forwarded the paper to its St. Paul correspondent for collection. This draft was dishonored; and, as a matter of fact, both the Anacortes and the Lloyds were insol-

<sup>1</sup> 69 N. W. Rep. 49.

vent, and the latter passed into the hands of defendant Johnson as receiver. On being notified that the paper had been dishonored, plaintiff charged the amount thereof, back to the Anacortes. The record shows that five different banks became mixed up in the attempt to collect a certificate issued by one of them, but nothing came of it. There were entries and counter entries, all along the line, but not a dollar was realized by the creditor. A more disgraceful and hopeless muddle would be difficult to conceive. Indeed, it could not well have been more disgraceful, had each of the participating banks been a patron and disciple of the *Banker's Magazine*, and taken its cue from that journal. As receiver of the insolvent Lloyds, defendant Johnson came into possession of certain dividends. These were sued for by plaintiff bank, upon the ground that it had made advances to the Anacortes, from which the collection was received, upon the faith of that collection. Geschke, the real owner of the fund, and the unfortunate victim of all these transactions, was permitted to intervene. Johnson, as receiver, brought the disputed fund into court, to abide the event of the suit. Owing to the number of banks involved, and their entries and counter entries, the matter was somewhat complicated. Fortunately for the honest administration of justice, however, the duty of writing the unanimous opinion of the full bench was placed in safe and able hands. That duty was devolved upon Justice Corliss, in whose comprehensive mental grasp the whole problem becomes plainer than any pike staff. So far as my reading goes, neither Stone, of Alabama; Bleckley, of Georgia; Cooley, of Michigan; Church or Folger, of New York; nor Black, of Pennsylvania, has left on record an abler opinion, on any question of commercial law. To those who are disposed to cavil and fling at the "cowboy" law of the "wild and woolly West," I commend this opinion as richly meriting a careful perusal. Among other things he said, in substance, this: "The certificate issued by the Lloyds was the property of Geschke. He did not sell it to the Anacortes, but merely intrusted it to such bank, as his agent, to collect the same, and to place the amount to his credit. By indorsing it for collection and credit, he notified the whole world that he had not parted with his title to the paper; that whoever

might secure possession of it, in the process of making collection according to the usages of banks, would hold it as his property, and, therefore, could not treat it as the property of any other.<sup>1</sup> Again, he said in substance: "This certificate being, to plaintiff's knowledge, the property of Geschke, plaintiff could not make advances thereon to the Anacortes, or in any manner deal with it except as the property of Geschke. Until it should have collected the same, the relation of principal and agent would exist between plaintiff and Geschke. Any advance or credit which it might make prior to that time would not in any manner prejudice Geschke's right to it, or to other property which had been substituted for it." And again: "If plaintiff had actually collected the sum due on this certificate, it could lawfully have credited the amount of such collection to the Anacortes, and thus have transmuted its relation of agent for the owner to that of debtor to the Anacortes \* \* \* But plaintiff did not receive cash in making the collection. It violated its duty to Geschke, in two important particulars. It sent the paper direct to the debtor; and it accepted a draft instead of money in payment. That it should not have sent this paper direct to the debtor is obvious;<sup>2</sup> it is equally true that it had no authority to receive anything but cash in payment.<sup>3</sup> \* \* \* Up to the moment of receiving cash, the relation of principal and agent remains unaltered. Whatever changes of form the principal's property undergoes, while in the hands of the agent, it is still the property of the principal, and he may follow it as such. If the agent surrenders the paper, or receives other paper in its place, the principal may claim the substituted paper, or he may repudiate this act of his agent, and claim the original paper

<sup>1</sup> *Bank v. Bank*, 76 Ind. 61; *Clafin v. Wilson*, 51 Iowa, 15; *Armstrong v. Bank*, 90 Ky. 431; *Tyson v. Bank*, 77 Md. 412; *Bank v. Bank*, 148 Mass. 553; *Bank v. Clark*, 23 Minn. 263; *Bank v. Hanson*, 33 Minn. 40; *Hoffman v. Bank*, 46 N. J. Law, 604; *Naser v. Bank*, 116 N. Y. 192; *Bank v. Hubbell*, 117 N. Y. 384; *Bank v. Gregg*, 79 Penn. St. 384; *Blaine v. Bourne*, 11 R. I. 119;

*Bank v. Armstrong*, 148 U. S. 60; *Bank v. Bank*, 155 U. S. 566.

<sup>2</sup> Citing *Bank v. Packing Company*, 117 Ill. 100; *Bank v. Goodman*, 109 Penn. St. 422.

<sup>3</sup> Citing *Levi v. Bank*, 15 Fed. Cas. 415; *Bank v. Ashworth* (Penn.), 16 Atl. Rep. 596; *Foster v. Busken* (Wyo.), 25 Pac. Rep. 470.

at the hands of the debtor. The latter is bound to take notice of the limitation on the power of the agent, which renders nugatory every act he does in connection with the collection, unless it is the surrender of the paper to the debtor for cash."

If the mind of the editor of the *Banker's Magazine* is at all open to conviction, touching the law of indorsement, he will find much wholesome instruction in the broad-gauge opinion from which the above is taken. The commercial law adjudications of last year were very handsomely rounded up by the case of *National Citizens Bank, of New York v. Citizens National Bank, of Raleigh*,<sup>1</sup> decided by the Supreme Court of North Carolina, November 24, 1896. The facts were these: A resident of Raleigh drew his check, in favor of a resident of New York City, which plaintiff undertook to collect. To that end, plaintiff indorsed the paper, thus: "For collection, for account of National Citizens Bank, of New York." Thus indorsed, the paper was sent to the Bank of New Hanover, at Wilmington. The latter indorsed it thus: "For collection, account of Bank of New Hanover, Wilmington, N. C." Bearing these two indorsements, this paper was sent to defendant bank. The latter at once credited the amount to the New Hanover, and, on the same day, collected from the payor. During all these transactions, the New Hanover was really insolvent; as a matter of fact, its deed of general assignment was recorded only fifteen minutes after it had been credited with the amount of this check. And even after making such credit, there was a balance against the New Hanover in favor of defendant. For that reason defendant refused to pay such proceeds, and this action was brought to recover the same. Plaintiff recovered judgment, from which defendant appealed.

Justice Montgomery, speaking for the full bench, said this in substance: "There was no error in rendering the judgment. Defendant saw from the indorsement on the check, that it was the property of plaintiffs and that the New Hanover was merely an agent to collect it for plaintiffs.<sup>2</sup> If there ever had been any conflict in the decisions of this court on the subject-matter

<sup>1</sup> 25 S. E. Rep. 971.

<sup>2</sup> Citing *Boykin v. Bank*, 118 N. C. 568.

embraced in this opinion before the case of *Boykin v. Bank*, was decided, that opinion would seem to have resolved the doubt. It was held in that case, in substance, that wherever it appeared on the face of the paper that it was in the possession of a bank for collection, the proceeds were the property of the owner; and that the actual collecting bank is liable to the owner in case of the insolvency of any intermediary bank which has received it for collection, unless the actual collector had remitted the proceeds or its equivalent to the bank from which he received it, before he had notice of that bank's insolvency. Simply entering credits, on mutual accounts between the actual collecting banks and their intermediaries, will not protect the actual collector from the demands of the owner. For their own convenience, it may be well for banks to observe such rules, but they will not be allowed to work injury and loss to owners of checks and drafts, who send them out to be collected and the proceeds returned to them." To recapitulate. All these cases recognize the very obvious principle that all parties to a contract of indorsement must stand or fall by the precise terms of that indorsement. Every person dealing with the indorsed instrument has a right to assume, and must assume, that the contract is precisely what, upon its face, it purports to be, neither more nor less, and that its terms will not be varied. Take the every-day case of an indorsement "for collection," like any of those above set forth: The relation between indorser and indorsee is that of beneficiary and trustee; and this is an express trust, pure and simple. But if the indorsee transfers either the paper or its proceeds to any third person having notice of the indorser's equities, such transferee will be a constructive trustee for such indorser. It is upon this familiar principle that indorsers are so often permitted to reclaim the fund from a transferee of the indorsee.

It is never safe to intermeddle with a trust fund; whoever takes it without consideration and without notice, or pays full value, but with notice, must respond to the beneficiary. In conclusion: It will be observed that Judge Williams was clearly right, and the *Bankers Magazine* just as clearly wrong. It will be further observed that the opinion of Judge Williams is not only sound in legal principles, but that he is in the right line



of judicial authority. It is not merely the Supreme Court of Pennsylvania, therefore, but the current and weight of judicial authority, generally, against which this Manhattan Island fog-horn lifts up its feeble voice. Because, if there was injustice in the decision rendered by Judge Williams, then nearly every case, on either side of the Atlantic, involves a denial of justice.

Whenever a judicial officer, who has done neither more nor less than his official duty, and whose lips are sealed for the time being, is assailed — the matter comes home to all of us. And if the assailant appears to have taken shelter behind the breastworks of impersonal journalism, more especially, it is the right and duty of law-abiding citizens to speak, and in no uncertain terms. In thus speaking, a spade should be called a spade — not hinted at, as being an oblong garden implement.

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## THE EVOLUTION OF THE AMERICAN FEE SIMPLE.

In the interesting little work of the historian, Edward A. Freeman, entitled, "The Growth of the English Constitution," especial prominence is given to the tendency of our modern social system to work back to the principles and the simplicity of Anglo-Saxon law and custom. A comparison of our American fee simple, the highest estate in real property, with the tenure of and estates in land in Anglo-Saxon days, will furnish a very striking example of this tendency.

Under the Anglo-Saxon land system, land held by *boc*; that is, by a grant evidenced by a written charter, corresponded very closely to our modern estate in fee simple. The owner could freely alienate it if he chose during his life, he could dispose of it by his last will, or if he died intestate, it descended to all his sons in equal shares, and it was, moreover, subject to be taken for his debts.<sup>1</sup>

When, with the advent of the Normans, the feudal system became fully established on English soil, these distinguishing features of the *boc*-land disappeared almost completely, to be regained little by little, at the hands of Parliament in a legal struggle lasting through six centuries.

The feudal system forbade any alienation whatever of the land, except by consent of the parties, the lord and vassal. Thus a vassal could not alienate his holding without the consent of his lord, nor could the lord alienate his seignory without the consent of his vassal. Naturally, therefore, land held by a feudal tenure could not be subject to the debts of the holder, and it was for the same reason impossible for the holder to dispose of it by will, since the consent of the lord, required by the closeness of the bond, manifestly cannot be given in case of a will.<sup>2</sup> But a feud might be heritable, for in granting it, the lord had a

<sup>1</sup> 1 Washburn Real Prop. \*16 and cited authorities.

<sup>2</sup> 1 Washburn Real Prop. \*27, 28.

right to prescribe the duration of the estate. So it might at first, and also at the time of the Norman Conquest, at least if held by socage tenure, descend to all the sons equally. But as early as the reign of Henry III, if not from the time of the Conquest, descent to the eldest son by primogeniture became the law of England.<sup>1</sup> Thus, after the establishment of feudal tenures in England, but one characteristic of the Anglo-Saxon land system survived, and that was the doctrine of heredit in land.

Whether a semi-feudal system prevailed previously to the conquest, it is not for our present purpose necessary to inquire. Certain it is that the conception of an indissoluble bond between the lord and tenant was not a part of the Anglo-Saxon-system.

It was therefore natural that the energies of the English people should be devoted to the breaking of this feudal bond which held them in subjugation, and the long contest waged in Parliament and the courts, aided by periodic uprisings of the people, did not come to an end until freedom of alienation was again recognized as an integral part of ownership in English land.

Before tracing the legal history and outcome of this contest, let us pause to note that the characteristic first to be restored to the land law was that of liability for the debts of the owner. The growing spirit of trade and commerce made this absolutely necessary, and by the statute *De Mercatoribus* in 1285,<sup>2</sup> this restoration was accomplished five years before the great statute of *Quia Emptores* completed the work of restoring freedom of alienation to the land law of the kingdom.<sup>3</sup>

We turn now to trace the legal history and effect of the great statutes of *Quia Emptores* and *DeDonis*. To do this a brief summary of the leading features of the feudal system is necessary.

The feudal system pure and simple consisted in the distribution of land to certain men by the king, which land these men in turn parceled out to their followers. Those holding directly of the king were the tenants *in capite* or chief tenants. The vassals of the tenants *in capite* were mesne tenants. At this point the ideal feudal distribution ends, but there was in fact

<sup>1</sup> 1 Washburn Real Prop. \*28 and note; 2 Blackstone Com. \*56, 57.

<sup>2</sup> 18 Edw. I.

<sup>3</sup> 1 Washburn Real Prop. \*54, 60.

another division of the land, and a practice known as subinfeudation. The mesne tenants would parcel out their lands to men who should hold the same directly of them, rendering in return services to these mesne tenants, who thus stood in the relation of lords.<sup>1</sup> Tenants thus holding of mesne tenants are known to the law as tenants *au paravail*, and the mesne tenants of whom they hold, are in respect to these their vassals, mesne lords. A careless use of terms by constitutional writers often confuses this matter by the application of the term mesne tenants to tenants *au paravail*.

It is readily seen that subinfeudation was a custom highly detrimental to the power of the king's tenants *in capite*. The revenue from the lands of their tenants was in fact due to them, but they did not get it, because these tenants, having made themselves lords by this subdivision of their own holdings, retained the greater part of these revenues on the ground that they were due to themselves from their own tenants *au paravail*. The energy of the chief tenants would then naturally be devoted to the extirpation of a custom so injurious to them.

The oath of allegiance which William the Conqueror, following the example of Charlemagne, exacted of lords and tenants alike, did not in the least hinder subinfeudation, as there is reason to suppose that sagacious monarch hoped it might. For the oath of fealty and homage to the feudal lord has always been carefully distinguished from the oath of allegiance to the sovereign. The latter merely binds the subject to follow the standard of his king in time of war in preference to the banner of his lord,<sup>2</sup> and, as a matter of fact, the tenants under subinfeudation took the oath of allegiance equally with their lords, the mesne tenants.<sup>3</sup>

A Magna Charta of Henry III. attempted to check subinfeudation by prohibiting a complete alienation of the lands of mesne tenants, and allowed them to make a partial alienation only upon condition that sufficient land should be retained to answer for

<sup>1</sup> Hallam Middle Ages, Chapter II, part I, p. \*92.

Supplemental Notes (1848), p. 279, note 150; 1 Washburn Real Prop. \*19.

<sup>2</sup> Hallam Middle Ages, Ch. II, pt. I, p. \*97; Ch. VIII, pt. II, p. \*81 and

<sup>3</sup> 1 Palgrave Rise and Progress Eng. Comwilt. 201.

the service to the chief lord, which, in practice, was regarded as one-half.<sup>1</sup>

It was not clear, however, whether after all this statute had abrogated the consent of the lord to his tenant's alienation, or even whether the tenant could alienate in *any* manner his entire fee. So subinfeudation still flourished and the chief lords of the kingdom were compelled to stand by and see the revenue which was due to them retained by their vassals, whose coffers were filled by the tenants of the subfeuds.

In the reign of Edward I. the attempt to break up subinfeudation succeeded by the passage of the celebrated statute of Westminster the 3rd, called *Quia Emptores*<sup>2</sup> whose actual effect was to restore to English land the ancient Anglo-Saxon quality of freedom of alienation, while its real purpose was to strengthen the power of the greater barons, the king's tenants *in capite* by eradicating subinfeudation. This, if accomplished, would make them the sole lords in the kingdom, to whom all feudal services and incidents should alone be rendered. This purpose is unequivocally expressed in the preamble: —

“Forasmuch as purchasers of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffees *and not of the chief lords of the fees*, whereby the same chief lords have many times lost their escheats, marriages and wardships of lands and tenements belonging to their fees: which thing seemed very hard and extreme unto those lords and other great men,” etc.

But this purpose could never be accomplished so long as the consent of the mesne lord continued necessary to the alienation by his tenant *au paravail* of the subfeud. He would never give his consent to an alienation which was to take his income out of his hands and *ipso facto* place it in the hands of another. The

<sup>1</sup> 2 Bl. Com. \*287-289; Charter of 9 Hen. III. c. 32. Note: Washburn and Hallam speak of this as a provision of the Magna Charta of John. The confusion is due to the fact that there

were other Magna Chartas in English history than the Great Charter of John.

<sup>2</sup> 18 Edw. I., C. 1; 1290 A. D.

only way to get the subfeud and its revenue was to dispense with the consent of the mesne lord. This was accordingly done, and in the words of the statute: "From henceforth it shall be lawful to every freeman to *sell at his own pleasure* his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the *chief lord* of the same fee by such service and customs as his feoffee held before."

The purpose then of this famous statute was exactly that of the statute of Westminster the 2nd,<sup>1</sup> called *De Donis*, passed five years before. That purpose was, to get into the hands of the king's chief tenants all the lands of England with their attendant wealth and revenues and there to hold them, from generation to generation. The act *De Donis* provided for the entailment of estates without any power of alienation of the same; the statute *Quia Emptores* allowed alienation of estates already alienable, but only on condition that the alienation should pass them into the hands of the chief tenants of the king.

But it should be carefully observed that the statute *Quia Emptores* had no application to the lands holden by these same chief tenants. They remained in the feudal *statu quo*. No alienation of the fees held by the chief lords was possible without the consent of their tenants, whether occurring before or after the passage of *Quia Emptores*. It is singular that so accurate a writer as Hallam should have made the error of supposing a possible alienation of a *chief* feud by force of *Quia Emptores*<sup>2</sup> basing upon it a theory of the multiplication of the numbers of the greater barons and the reduction of their dignity. His earlier statement<sup>3</sup> is the correct one: "The tenants of the crown were not included in this act<sup>4</sup> but that of 1 Edward III.<sup>5</sup> enabled them to alienate upon the payment of a composition into chancery, which was fixed at one-third of the annual value of the lands."<sup>6</sup>

The intended effects of this statute of *Quia Emptores* were secured. Subinfeudation was crushed. The only feudal lords

<sup>1</sup> 13 Edw. I. c. I (A. D. 1285).

<sup>2</sup> Supplemental notes to Hallam's *Middle Ages* (1848), note 172. "Electors of Knights," p. 322.

<sup>3</sup> *Middle Ages*, ch. II. pt. I, p. \*103.

<sup>4</sup> *Quia Emptores*.

<sup>5</sup> C. 12 (A. D. 1327).

<sup>6</sup> Cf. 2 Bl. Com. \*72.

of the kingdom were in future the king's tenants, the *great* lords. The statute neither increased nor decreased their numbers, because it left untouched the limitation of their own powers of alienation. That was not altered till 1327, thirty-seven years later, when the statute of 1 Edw. III., already cited, enabled them to do so. It vastly increased their wealth and dignity, by increasing the number of their immediate vassals and pouring into their coffers the rents and profits that had heretofore been held in the grasp of those vassals.

On the other hand the unintended, actual effects of this great historical landmark were to prove the most enduring, because they were acting to remove restraint upon the freedom of the individual, that goal to which all social advancement has been tending. It did raise the mesne tenants, that vast body of English freeholders, to a new dignity and vastly increased their numbers. It lifted each and every subfeudator to the level of his former lord, to hold his land henceforth by derivation from the crown through but *one* lord, the king's tenant *in capite*. It gave to every English freeman the rights of suffrage and office holding which if conceded at all were only doubtfully exercised by the subtenants under the regime of subinfeudation. Lastly it was the entering wedge for a re-establishment of the ancient principle of entire freedom of alienation, which, extended in 1327 to the tenants of the crown, became fully restored in 1660, when the Act of 12 Ch. II.<sup>1</sup> abolished all restraint on alienation, along with military tenures *in toto*.

Thus our modern fee-simple, whose distinguishing characteristic is entire freedom of alienation, became, by the operation of *Quia Emptores*, unalterably fixed as the highest estate known to the law, and since that time no fee-simple can be created in England save by grant of the sovereign.

But the statute *Quia Emptores* affected merely alienations *inter vivos*. For two hundred years longer the inability to dispose of land by will remained. In 1541 by the passage of the Statute of Wills,<sup>2</sup> English landholders regained their power to direct the distribution of their lands after their death, a power

<sup>1</sup> C. 24.

<sup>2</sup> 32 Hen. VIII. C. 1.

not enjoyed since the Conquest. Thus the land law of England remains, having slowly worked back to the pristine Saxon principles, with but one exception. The feudal descent by primogeniture still lingers. To the Anglo-American across the western sea, was reserved the privilege of returning to the Saxon system in its entirety, and even surpassing it, for with us descent is to all children equally, the daughters sharing with the sons.

It is, too, a singular fact that our American system of recording deeds for the security of land titles has its prototype in the Anglo-Saxon custom of preserving the *books*, or parchment charters, in monasteries, to be safely kept as perpetual evidence of title.

At the time of the English settlement of America, military tenures had not been abolished in England. The grant of lands by the crown to the early colonies described the tenure to be free and common socage, and not *in capite* by knight service. Some of the charters reserve, as in the nature of rent, a certain part of the gold or silver ore to be found in the granted territory. In the case of certain manorial grants in New York, it was doubted whether since the passage of *Quia Emptores*, the crown could grant new manors. The question was decided in favor of such power, in so far that the king could grant to his own tenants authority to grant lands to be holden of such tenants instead of to the king as superior lord.<sup>1</sup>

When the colonial lands were parceled out to the actual settlers these latter were considered to derive their title from the king by force of *Quia Emptores*, which acted upon lands held by socage tenure as well as upon subfeudatories. No title save that by occupation was recognized in the native Indians and their deeds were regarded as a mere extinguishment of claims. The title of the king was based upon the discovery by John Cabot in 1496.<sup>2</sup>

At the close of the Revolution, when by the treaty of 1783 Great Britain relinquished all claim to the proprietary and territorial rights of the United States, these rights rested in the

<sup>1</sup> *People v. Van Rensselaer*, 9 N. Y. 291.

<sup>2</sup> 2 Washburn Real Prop. \*518 and cited authorities.



States. But as the States were merely the landholders themselves, acting in a corporate capacity, it seems reasonable to argue that by a merger of the tenant in the lord, the rights of tenure ceased and the ownership of land became absolute in the holder of the title. But to make assurance doubly sure some of the States have by legislation declared their lands to be allodial, and have thus abolished feudal tenures. In others the courts have held that the land is allodial.<sup>1</sup>

Thus in fact, if not also by the logic of the law, American lands are now allodial, and every vestige of the feudal system has vanished except in the retention of certain technical terms to designate the quality or extent of the interest of the holder in his land, such as for instance "fee simple," "life estate," and the like, the conception of tenure, without its real existence.

If such be the case, it would seem that the growing tendency toward simplicity in the wording of deeds and in the formality of sealing and witnessing is in strict accordance with the evolution of the modern fee simple.

If there is no difference in the nature of the ownership of realty and of personalty save that the latter is capable of manual possession and the former is not, and that the former is less perishable than the latter, the simplicity that characterizes the transfer of the one should characterize the transfer of the other, provided that due care be taken to secure the preservation of evidence of title so long as the property itself shall endure. Real property being in theory indestructible and heritable, of necessity demands greater precaution to preserve documents which are evidences of title.

The next step in evolution seems to be a change in our record system. If the Torrens system or some suitable modification of it shall be adopted, it would seem to be a natural outcome of the tendency toward freedom and simplicity in the alienation of land.

Thus far every step in the history of our land law appears to be a development of or a return to the principles of our Anglo-Saxon forefathers, namely, absolute ownership of the land, en-

<sup>1</sup> Pomeroy *Introd.* 272; 1 Washburn *R. P.* \*40-42.

the freedom of alienation *inter vivos* or by will, descent to all the sons equally, perpetual inheritance, and perpetual preservation of evidences of title, in the simplest manner consistent with the importance of the end to be attained.

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## POOLING CONTRACTS AND PUBLIC POLICY.

It may be conceded that there has been recognized by the courts of this country in the past decade a principle of public policy which under some circumstances is inconsistent with the separation of the voting power from the actual ownership of stock in a corporation; so that a stockholder has not always been held bound by his agreement to allow another person to vote his stock, or by his agreement to vote the stock himself according to another person's wishes. This consideration of public policy, it is true, never so far invalidates such an agreement that a vote cast in pursuance of it at a corporate election may be rejected, where the stockholder who entered into the agreement is himself willing to abide by it.<sup>1</sup> Nor will an injunction be granted at the suit of another stockholder, not a party to the agreement, to restrain the casting of a vote in accordance with it.<sup>2</sup> To quote the language of one of the cases: <sup>3</sup> "Each member has the clear right to cast his ballot as he pleases, wisely or unwisely, and no other stockholder can control his conduct, or gainsay his discretion. And it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so. The vote when cast is but the expressed wish of the stockholder, or, at least, must be so regarded, and no other stockholder can be supposed to be injured thereby. To hold otherwise would greatly abridge the voter's right to cast his ballot as he pleases." But the question assumes a different phase when one of the parties wishes to withdraw from the agreement; and courts have in many cases granted relief to the stockholder who asks to be allowed to cast his vote according to his own wishes, and have refused relief to other

<sup>1</sup> *Ohio &c. Co. v. State*, 49 Ohio St. 668; 32 N. E. Rep. 938 (1892).

<sup>2</sup> *Woodruff v. Dubuque &c. Co.*, 80 Fed. Rep. 91 (1887).

<sup>3</sup> *Moses v. Scott*, 84 Ala. 608, 611; 4 So. Rep. 742, 744 (1887).

parties to the agreement who have sought to have its performance enforced or its breach enjoined.<sup>1</sup>

Although the language of the cases is not altogether consistent as to the basis of the principle of policy which makes such an agreement invalid, the principle seems to be founded on the quasi-public duty that every stockholder owes to his fellow-stockholders, and proceeds on the theory that sound management can best be secured if those who own the stock retain the control of the corporation. In one of the recent cases<sup>2</sup> the court speaks of the "right which each stockholder has to the benefit of the fundamental and salutary rule that the best interests of the minority are found in a rule by the majority." And in another decision,<sup>3</sup> more recent still, it is said that "each stockholder, whether by himself or by proxy, must be free to cast his vote for what he deems for the best interest of the corporation, the other stockholders being entitled to the benefit of such free exercise of his judgment by each." As has been before suggested, this principle cannot, of course, be carried so far that a stockholder may be compelled to exercise his individual judgment or to vote in accordance with it, after it is once exercised. But the courts can remove restrictions that stand in his way when he wishes to act himself; and it would seem to have been in the interest of the other stockholders that this has been done.

Other reasons for the rule than that above indicated have possibly been present to the mind of the court in the various cases and are more or less apparent in the various opinions. But nowhere do they seem to be regarded as the substantial basis for the principle invoked. In some decisions<sup>4</sup> the rule which forbids a restraint on alienation has been considered as bearing on the question. This may be applied possibly in behalf of the successor in interest to one of the parties to the agreement, but hardly in favor of the parties themselves, except as to

<sup>1</sup> Griffith v. Jewett, 19 Abb. N. C. 462; 15 Weekly Law Bull. 419 (1886).  
Vanderbilt v. Bennett, 19 Abb. N. C. 460; 2 Ry. and Corp. L. J. 409 (1887),  
and cases cited *infra*.

<sup>2</sup> White v. Thomas & Co., 52 N.

J. Eq. 178, 187; 28 Atl. Rep. 75, 79 (1898).

<sup>3</sup> Harvey v. Linville & Co., 118 N. Car. 698, 698; 24 S. E. Rep. 489, 490 (1896). See also Gage v. Fisher, 65 N. W. Rep. 809, 818 (N. Dak. 1895).

<sup>4</sup> See Moses v. Scott, *supra*.

some collateral covenant not to sell otherwise than subject to the main agreement. In other decisions<sup>1</sup> expressions are to be found connecting such an agreement with agreements for the formation of monopolies; but, in itself and unconnected with other matters, it can hardly be said to be open to the objection that it is in restraint of trade. One opinion<sup>2</sup> goes so far as to suggest that the principle is established for the purpose of protecting the particular stockholder who enters into the agreement from the consequences of his own act. But no particular stress was laid on this consideration, and the policy of the law would find little justification in the fact that the stockholder who attempts to bargain away his right to vote will be himself a sufferer. If the person making the contract were to be the only one injured by its enforcement, a refusal to hold it binding would be an unwarrantable limitation on the right of private contract. Again it is suggested that the community at large, and not merely the stockholders themselves, are particularly interested in the sound management of a corporation, so that the principle finds support in public interest as well as the private interest of the individual members of the corporation. In many cases, involving a railroad or other quasi-public corporation, this would be, perhaps, a consideration of some importance; but whether in view of the essentially private nature of many corporations the public may be said to be so directly concerned that their interest should be made the foundation of a general rule of law applicable to all corporations may be questioned. And, finally, little or no weight would probably be given at the present day to the theory that the State in giving its franchise has laid a personal trust on the members of a corporation of which they should not be allowed to divest themselves. The present legal relation between the State and its corporations would seem not to warrant such an inference.

It is a fair conclusion, then, that the substantial basis for this principle of policy is the necessity of affording protection to the stockholders of the corporation against the manipulations of

<sup>1</sup> See *Clark v. Central &c. Co.*, 50 Fed. Rep. 338, 345 (1892).

<sup>2</sup> *Shepaug Voting Trust Cases* (*Bostwick v. Chapman*), 60 Conn. 553, 579; 24 Atl. Rep. 32, 41 (1890).

men whose interests do not coincide with theirs. If this is in fact the true reason for the rule, it will be observed that it assumes the stockholders of a corporation to be within the peculiar protection of the law. No such principle could be invoked on behalf of the members of a copartnership. The following extract from another case indicates that, and suggests at the same time the reason for the distinction. "The theory," it is said,<sup>1</sup> "upon which the capital of numerous persons is associated in various proportions, in the shape of a trading corporation, to be managed by a committee of the stockholders, is that such committee shall truly represent and be subject to the will of the majority in interest of the stockholders. The security of the small stockholders is found in the natural disposition of each stockholder to promote the best interests of all, in order to promote his individual interest. A member of an ordinary partnership has an additional security in the personal character of each of his partners, and may decline to be associated with any whom he does not know and approve. But a stockholder in a corporation cannot control the *personnel* of his associates, and must rely upon their self-interest alone." And in another case,<sup>2</sup> the court said that the agreement in question would have been unobjectionable if the parties had remained merely members of a partnership, but "the difficulty and weakness of defendants' position in regard to it arises out of the machinery adopted by the parties to carry through their scheme. They organized a stock company, with all its inherent characteristics." It will be observed, too, that the principle is based on the further assumption, as is indicated by the preceding extracts, that in the long run and as a general rule, corporations will be more prudently managed, if those who control their management are the ones who as stockholders will profit by their prosperity and suffer in their disaster.

Three main questions have been raised in the application of this principle to particular cases. First: Can it be shown in the particular instance that the agreement was entered into for the best

<sup>1</sup> Cone's Exrs. v. Russell, 48 N. J. Eq. 208, 212; 21 Atl. Rep. 847, 849 (1891).

<sup>2</sup> White v. Thomas & Co., 52 N. J. Eq. 178, 186; 28 Atl. Rep. 75, 78.

interests of the corporation and that its enforcement will be to the advantage of the corporation, and will such a showing control the action of the general principle? Second: Can the operation of the rule be affected by the fact that the parties to the agreement have parted with substantial value on the faith of it? And third: When the interest in the stock is divided, will any interest on the part of the person voting the stock under the agreement short of the entire beneficial interest make the agreement a valid one? These questions present some difficulties, and have introduced an element of uncertainty into the adjudicated cases. While there is an observable tendency to make the rule universal in its application and to deny any effect to such considerations, still one or another of them has been given weight in particular cases, and one case, at least, answers all these questions in the affirmative. There it is said:<sup>1</sup> "Upon principle, we would hold that, in determining the validity of an agreement which provides for the vesting of the voting power in a person other than the stockholder, regard should be had to the condition of the parties, the purpose to be accomplished, the consideration of the undertaking, interests which have been surrendered, rights acquired, and the consequences to result. The law does not make contracts for parties. Neither will it annul them, except to preserve its own majesty, and to conserve the greater interest of the public."

In regard to the first question it was said in a case<sup>2</sup> which involved an agreement with a clearly objectionable purpose, and in which the court reached the conclusion that the agreement was not binding: "This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders. The propriety of the object validates the means and must affirmatively appear." And in the case<sup>3</sup> cited just above the court says: "We have

<sup>1</sup> *Mobile &c. Co. v. Nicholas*, 98 Ala. 92, 118; 12 So. Rep. 723, 731 (1893).

<sup>2</sup> *Cone's Exrs. v. Russell*, 48 N. J. Eq. 208, 215; 21 Atl. Rep. 847, 850.

<sup>3</sup> *Mobile &c. Co. v. Nicholas*, 98 Ala. 92, 118; 12 So. Rep. 723, 731.

examined case after case and find generally that the agreements declared void by the courts where the power to vote was separated from the stockholder, and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful,—such as the courts would not sanction if the principal had voted and not a proxy.” A recent California case<sup>1</sup> takes the same ground. Yet while it may be true that in many of the cases the agreement was objectionable for some other reason than that it involved the separation of the voting power from the ownership, it was not so in all cases.<sup>2</sup> Moreover if such a consideration is to be regarded as controlling, the general principle ceases to become a principle of public policy, and the reasoning of most of the other cases must be held unsound. If such an agreement is invalid only when the vote is to be used for some unlawful purpose, then such a statement as this, that “the universal policy of the law is that the control of stock companies shall be and remain with the owners of the stock,”<sup>3</sup> and similar expressions<sup>4</sup> have no significance. As is said in a recent case:<sup>5</sup> “Proof that the object was legitimate, that the motive was pure, would furnish no guaranty that the real purpose was not to wreck or mismanage the corporate affairs. In no case can a court determine with certainty just what course the minority stockholder when armed by the court with this absolute power over the corporation will pursue when he has attained his vantage ground. \* \* \* But because there is always danger that such purpose may be dishonest, and because the court can never surely know the truth as to the real motive, it may be that courts of equity should inflexibly refuse to aid the minority stockholder in his effort to obtain control.” And in this latter case the court, although of the opinion that the motive was honorable, refused to enforce the agreement and said:<sup>6</sup> “We are satisfied that both on principle and under sound authority the true rule is that a court of equity should never specifically enforce a contract by

<sup>1</sup> *Smith v. San Francisco &c. Ry. Co.*  
47 Pac. Rep., 582 (1897).

<sup>2</sup> See *White v. Thomas &c. Co.*,  
*supra*; *Gage v. Fisher, supra*; *Harvey*  
*v. Linville &c. Co., supra*.

<sup>3</sup> *Griffith v. Jewett, supra*.

<sup>4</sup> *Vid. supra*, pp. 237, 239.

<sup>5</sup> *Gage v. Fisher*, 65 N. W. Rep  
809, 812.

<sup>6</sup> *Ibid.*, p. 811.



which one person agrees that another should control his stock without purchasing it, where the sole ground of the appeal to equity is the desire of the party making the appeal to secure control of a corporation through the use of the stock he is thus seeking to control." It is against the danger of mismanagement, not merely mismanagement itself, that the law guards the stockholders.

On principle it would seem likewise that the answer to the second question should be the same, and it should make no difference what value has been parted with on the faith of the agreement, if the law gives the stockholder, on account of his duty to his fellow-stockholders the right to withdraw from it. There would seem to be no way in which the rights of the other stockholders could be balanced off against the rights of the parties to the agreement, and their comparative strength determined. In one case,<sup>1</sup> in fact, it is expressly said that the fact of there having been a substantial consideration to support the agreement would be a determining element only in case the machinery of a stock company had not been adopted to carry out the scheme. Yet in the two or three cases<sup>2</sup> in which courts have upheld these agreements, the fact that those who asked their enforcement had embarked large capital on the faith of them has been one of the grounds on which the decision rested.

To the third question stated above, however, it would seem that the courts could give an affirmative answer without violating the spirit of the rule. While it is necessary, if the principle is to be accepted as a sound one, that the person voting the stock should have some substantial interest in it, and therefore something at stake, it would seem not to be necessary that he should be the only owner. In laying down the general principle it is said in one case:<sup>3</sup> "It is the policy of our law that ownership of stock shall control the property and the management of the corporation, and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will in the important matter of

<sup>1</sup> *White v. Thomas & Co.*, *supra*. Y. Suppl. 627 (1895); *Smith v. San*

<sup>2</sup> *Mobile & Co. v. Nicholas*, *supra*; *Francisco & Co. Ry. Co.*, *supra*.

*Hey v. Dolphin*, 92 Hun, 280; 26 N.

<sup>3</sup> *Shepaug Voting Trust Cases*, *supra*.

voting, and suffer themselves to be mere passive instruments in the hands of some agent, who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation." This is said in one of the cases in which the principle is laid down in an extreme form; and one<sup>1</sup> of the few cases in which a similar agreement is held valid, is distinguished by the court itself in its opinion on the ground that the trust under consideration was not a dry trust, but that the trustee voting the stock had a special interest in the prosperity of the corporation. The point is illustrated further in another case<sup>2</sup> upholding such an agreement. Plaintiff and defendant had embarked in an enterprise as partners, transferring patents owned by them to a corporation, and receiving in return a portion of the stock, which was issued to them jointly. They together executed an instrument giving defendant a power to vote the joint stock for ten years. Before the end of the ten years this action was brought for the revocation of the power of attorney and a partition of the corporate stock. It was urged by plaintiff that the contract was invalid, as being contrary to public policy, but the court said:<sup>3</sup> "It is to be borne in mind that the plaintiff and [defendant] \* \* \* were joint owners of the invention transferred to the corporation. \* \* \* The relation between [them] was not terminated but changed. The common property assumed another form, and its management for a definite period, for reasons satisfactory to themselves, and not, as between themselves, illegal, was intrusted to one of the parties. This was the effect of the power of attorney." And the court continued, referring to the element of sufficient consideration, spoken of above:<sup>4</sup> "The consideration for this was ample, as it was a part of the transaction of the sale of the inventions and the purchase of the stock. It may be assumed that neither of the parties would have assented to the sale and purchase only on these conditions. \* \* \* Nor should it be said that the power of attorney was revocable at the pleasure of the plaintiff. It

<sup>1</sup> Mobile &c. Co. v. Nicholas,  
*supra*.

<sup>2</sup> Hey v. Dolphin, *supra*.

<sup>3</sup> 92 Hun. 238; 36 N. Y. Suppl. 631.

<sup>4</sup> *Vid. supra*, p. 242.

was a power given for a consideration and [defendant] had an interest in the property itself."

Some of these questions were considered in a case<sup>1</sup> which has been very recently decided by the Supreme Court of California, and which contains what is perhaps the latest expression of judicial opinion on the subject. That case involved the validity of a contract by which the parties bound themselves to vote their stock as a unit in the way on which the majority of them should determine. On the construction given by the court to the facts in the case the agreement was entered into at the time of the purchase of the stock by the parties and was part of the inducement to the purchase. One of the parties sought to withdraw from the contract; but the court, going farther even than the cases<sup>2</sup> last cited, held that there was no principle of public policy which forbade the separation of the voting power from the beneficial ownership of the stock in a corporation; that, if the agreement was supported by a sufficient consideration, and if the purpose of the agreement was not in itself an unlawful one, then the contract was so far unobjectionable that a vote cast in pursuance of it, although against the protest of the dissenting party to the agreement, might be legally counted in an election of directors. The court said in its opinion, without examining the general reasoning of the cases hereinbefore cited,<sup>3</sup> that they could not be considered as authorities on the particular point in issue, because in each one of them there was present the element of lack of consideration, or illegality of purpose; or else a successor in interest and not an original party to the agreement was the one who wished to be relieved from its effect. The principle indicated so strongly by the language of some of the other decisions,<sup>4</sup> that every stockholder of a corporation for the benefit of his fellow-stockholders must be left free to cast his vote as he chooses, is not referred to; and the general objection to the validity of the contract, that it separates the voting power from the ownership, the court said, cannot be raised, now that the express policy of the law recognizes the validity of

<sup>1</sup> *Smith v. San Francisco &c. Ry. Co.*, *supra*.

<sup>2</sup> *Vid. supra*, p. 243.

<sup>3</sup> *Vid. supra passim*.

<sup>4</sup> *Vid. supra*, pp. 237, 239, 241.

proxies, apparently begging the very question at issue, the question whether the law does allow *irrevocable* proxies. The court, however, escaped the necessity of deciding the question which was submitted to them on another appeal<sup>1</sup> at the same time, as to whether an injunction should be granted to prevent the dissenting party from casting his vote according to his own wishes. This injunction had been denied by the lower court and an opinion filed holding the agreement illegal, which has been referred to in a previous number of the REVIEW.<sup>2</sup> But the other parties to the agreement had taken the law into their own hands and refused to allow the dissenting stockholder to vote his stock, so that he was obliged to have recourse to an action to set the election aside. It was on an appeal in this latter action that the Supreme Court delivered the opinion above cited, supporting the agreement; but the case is somewhat weakened as an authority by the fact that the decision was concurred in by only a bare majority of the court, and that the Chief Justice filed a dissenting opinion giving his adhesion to the main principle of public policy above indicated. He says: "I am satisfied that the weight of authority is against the validity of any contract, by which the sole owner of stock parts irrevocably with the right to vote it; with the effect of putting a minority in control of the corporation."<sup>3</sup>

The most that can be said, perhaps, after an examination of all these recent cases, is that the law is uncertain, and the authorities conflicting. But at any rate, a court when asked to enforce an agreement by which a stockholder gives up his right to vote, will scrutinize it closely, in view of the fact that the stockholders of a corporation are to some extent trustees for each other, and that perhaps they are entitled to rely for the sound management of the corporation on a unity of power and control with interest. If the person to whom the voting power is given has a beneficial interest in the stock, the agreement is not open to the objection which might otherwise be urged against it. But there is at least a serious doubt whether the fact that the parties to the agreement, relying on its validity, have parted

<sup>1</sup> Foster v. Smith. 47 Pac. Rep., 591 (1897).

<sup>2</sup> Am. Law Review, Vol. XXX, p. 565.

<sup>3</sup> 47 Pac. Rep., 591.

with value; or the fact that the object of the agreement is itself the best good of the corporation, are elements which will make the contract enforceable, or will justify a court in refusing to allow a dissenting stockholder to withdraw from it. It will be necessary to wait for further adjudication and definite reasoning on different sets of facts before a clear rule can be deduced applicable to the widely differing circumstances under which the question is likely to present itself.

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## LATERAL SUPPORT OF LAND.

Every owner of land has a right to have the soil of his neighbor's land remain as a support for his land in its natural condition.<sup>1</sup> Each of two adjoining land owners is entitled to the

<sup>1</sup> *Humphries v. Brogden*, 12 Q. B. 739; *Rigby v. Bennett*, 21 Ch. D. 559; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Attorney-General v. Conduit Colliery Co. L. R.* [1895], 1 Q. B. 301; *Transportation Co. v. Chicago*, 99 U. S. 685.

*Alabama*: *Moody v. McClelland*, 39 Ala. 45; 84 Am. Dec. 770; *Myer v. Hobbs*, 57 Ala. 175; 29 Am. Rep. 719. *California*: *Green v. Berge*, 105 Cal. 52; 38 Pac. Rep. 539; *Aston v. Nolan*, 63 Cal. 269.

*Indiana*: *Moellering v. Evans*, 121 Ind. 195; 6 L. R. A. 449, 22 N. E. Rep. 989; *Block v. Haseltine*, 3 Ind. App. 491; 29 N. E. Rep. 937.

*Kansas*: *Winn v. Abeles*, 35 Kan. 85; 10 Pac. Rep. 448.

*Kentucky*: *Louisville & N. R. Co. v. Bonhayo*, 94 Ky. 67; 21 S. W. Rep. 526; *Covington v. Geylor*, 98 Ky. 275; 19 S. W. Rep. 741; *Clemens v. Speed*, 93 Ky. 284; 19 S. W. Rep. 660; *Onell v. Harkins*, 8 Bush, 650.

*Maryland*: *Baltimore & P. R. Co. v. Beane*, 42 Md. 117.

*Massachusetts*: *Foley v. Wyeth*, 2 Allen, 131; 79 Am. Dec. 771; *Thurston v. Hancock*, 12 Mass. 230; 7 Am. Dec. 57; *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312.

*Michigan*: *Gildersleeve v. Hammond (Mich.)*, 67 N. W. Rep. 519; *Buskirk v. Strickland*, 47 Mich. 389; 11 N. W. Rep. 210.

*Minnesota*: *Nichols v. Duluth*, 40

*Minn.* 389; 42 N. W. Rep. 84; *Schultz v. Bower*, 57 Minn. 493; 59 N. W. Rep. 631; per *Mitchel, J.*, 66 N. W. Rep. 189; *Kopp v. Northern Pac. R. Co.*, 41 Minn. 310; 43 N. W. Rep. 73.

*Missouri*: *Eads v. Gains*, 58 Mo. App. 586; *Secongost v. Missouri Pac. R. Co.*, 53 Mo. App. 369; *Victor Min. Co. v. Morning Star Min. Co.*, 50 Mo. App. 525; *Charless v. Rankin*, 22 Mo. 566; 66 Am. Dec. 642; *Busby v. Holthaus*, 46 Mo. 161.

*New Jersey*: *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49; *Schultz v. Byers*, 53 N. J. L. 442; 22 Atl. Rep. 514.

*New York*: *Lasala v. Holbrook*, 4 Palge, 169; 25 Am. Dec. 524; *Hay v. Cohoes Co.*, 2 N. Y. 159; 51 Am. Dec. 279; *Radcliff v. Mayor*, 4 N. Y. 195; 53 Am. Dec. 357; *Farrand v. Marshall*, 21 Barb. 409; *Panton v. Holland*, 17 Johns. 92; 8 Am. Dec. 369.

*Pennsylvania*: *McGettigan v. Potts*, 149 Pa. St. 155; 24 Atl. Rep. 198; 30 W. N. C. 137; *Carlin v. Chappel*, 101 Pa. St. 348; 47 Am. Rep. 722; *Wier & Bell's App.* 81\* Pa. St. 203.

*South Dakota*: *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285; 3 S. D. 44; 49 N. W. Rep. 1054, affirmed; 51 N. W. Rep. 1023.

*Vermont*: *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *Beard v. Murphy*, 37 Vt. 99; 86 Am. Dec. 693; *Hatch v. Vermont Cent.*

lateral support of the other's land. The right of lateral support from the adjacent soil to the extent that such support is essential, is an absolute right of property. The right to recover for injuries to the land by reason of the removal of such support does not depend upon negligence, but upon the violation of the right of property.

The only neglect necessary to give cause of action is the neglect to furnish proper support to the land of the adjoining owner to prevent its caving in.<sup>1</sup> The only proof necessary is of the making of the excavation and of the injury to the adjoining land in consequence. It is not incumbent on the plaintiff to show that the excavation was made by the defendant in a careless, negligent or unskillful manner.<sup>2</sup>

Though one in excavating and removing the soil on his own land has not conducted the work negligently or in a manner contrary to the custom of the country, he is liable to his neighbor for any injury to his land occasioned by such excavation.<sup>3</sup>

Where one, by digging in his own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall. It is the wrong to the right of property that attaches to the right of lateral support. Hence the measure of damages is the diminution of the value of the land by reason of the falling of the soil;

R. Co., 25 Vt. 49; *Graves v. Mattison*, 67 Vt. 680; 82 Atl. Rep. 498.

*Virginia*: *Stearns v. Richmond*, 88 Va. 992; 14 S. E. Rep. 847; 29 Am. St. Rep. 758; *Tunstall v. Christian*, 80 Va. 1; 56 Am. Rep. 581; *Stevenson v. Wallace*, 27 Gratt. 77, 86.

See as to the nature of the right of lateral support: *Dalton v. Angus*, 6 App. Cas. 740, 791, per Lord Chancellor Selborne; *Caledonian Railway Co. v. Sprot*, 2 Macq. 449; *Bonomi v. Backhouse*, 1 E. B. & E. 647, 655; *Pountney v. Clayton*, 52 L. J. Q. B. 566, 571, per Bowen, L. J.

<sup>1</sup> *Green v. Berge*, 105 Cal. 52; 88 Pac. Rep. 589; *Conboy v. Dickinson*, 92 Cal. 600; 28 Pac. Rep. 809; *Aston*

*v. Nolan*, 68 Cal. 269; *Gildersleeve v. Hammond* (Mich.), 67 N. W. Rep. 519; *Baltimore & P. R. Co. v. Beaney*, 42 Md. 117; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49; *Hay v. Cohoes Co.*, 3 N. Y. 159, 162; 51 Am. Dec. 279; *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285; 8 S. D. 44; 49 N. W. Rep. 1054, affirmed 51 N. W. Rep. 1023.

<sup>2</sup> *Transportation Company v. Chicago*, 99 U. S. 635; *Gilmore v. Driscoll*, 122 Mass. 199; 28 Am. Rep. 812; *Foley v. Wyeth*, 2 Allen, 181; 79 Am. Dec. 771.

<sup>3</sup> *Humphries v. Brogden*, 12 Q. B. 787; *Brown v. Robins*, 4 H. & N. 186.

and it is immaterial whether this falling be called "caving" or "washing," provided it is the natural and proximate result of removing the lateral support.<sup>1</sup>

The parties may, however, agree that all support may be removed, or may agree upon the compensation for such removal. One who has granted land reserving the right to enter on a certain part thereof and dig and take clay and sand for making brick, or to work minerals, is at liberty to remove the lateral support of the land granted by digging within the part designated, in the exercise of the right reserved.<sup>2</sup> Where land was granted for building purposes, reserving the minerals beneath with power to get them, "but without entering upon the surface, so that compensation in money be made for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties," the grantor was entitled to take the minerals without leaving any support, subject only to compensation for damage.<sup>3</sup>

The right to natural support for land is presumed to be incident always to the ownership of the land, and it is for the party who claims that this right has been parted with, to prove it.<sup>4</sup> There is no cause of action, however, if no damage was done. The right of the owner of land to the lateral support of his neighbor's land is not an absolute right irrespective of the element of damages, and the infringement of it is not a cause of action without appreciable damage. "But for a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbor; and since it is the injury itself which gives rise to the right of action there can be no right of action unless the damage is of an appreciable amount."<sup>5</sup> There is no right of action unless the soil of the land is disturbed, though, by reason of the digging, the land presents an unsightly appearance.<sup>6</sup>

<sup>1</sup> *Schultz v. Bower*, 57 Minn. 498; 59 N. W. Rep. 681.

<sup>2</sup> *Ryckman v. Gillis*, 57 N. Y. 68, reversing 6 Lans. 79.

<sup>3</sup> *Aspden v. Seddon*, L. R. 10 Ch. 394; 1 Exch. D. 496. And see *Smart v. Morton*, 5 El. & B. 30; *Roberts v.*

*Haines*, 6 E. & B. 643; 7 E. & B. 625; *Harris v. Ryding*, 5 M. & W. 60.

<sup>4</sup> *Dixon v. White*, 8 App. Cas. 883; *Dalton v. Angus*, 6 App. Cas. 740, 792; *Davis v. Treharne*, 6 App. Cas. 460.

<sup>5</sup> *Smith v. Thackerah*, L. R. 1 C. P. 564, 566, per Erle, C. J.

<sup>6</sup> *Williams v. Kenney*, 14 Barb. 629.



The support to which a land owner is entitled from the adjacent land is confined to a limited extent of adjacent land, that is, to such an extent as in its natural undisturbed state was sufficient to afford the requisite support.<sup>1</sup> If the adjoining owner excavates nearer to the boundary line than such limit he is bound to furnish support to the land by artificial means, such as a retaining wall. By such means the excavation may be made fully up to the boundary line.<sup>2</sup> The artificial support substituted in place of the natural support of the soil may be of any material provided it is sufficient for the purpose and it is continued so as to maintain the land in its proper condition.<sup>3</sup>

One cannot escape liability for an injury caused by insufficient support by showing that the support was a reasonable or customary support, or that the excavations were made with care and skill. It is simply requisite that the support shall prove to be sufficient and effectual.<sup>4</sup>

The extent in point of distance to which the right of lateral support applies must necessarily depend very much upon the nature of the surface of the land and of the adjacent soil. "If the soil is adhesive, so that it will remain in its natural position with the lateral support removed, obviously the excavator may excavate as deep as he pleases, even close to the boundary line. If in such case his neighbor's land caves in by reason of the pressure of the superstructure upon it, it is *damnum absque injuria*. But is this true of a sandy, gravelly soil? Most of the authorities above cited recognize the duty of the excavator to use reasonable care in the performance of his work."<sup>5</sup>

One is not justified in removing the support of his neighbor's land on the ground that the land of both is higher than the adjoining street and the excavation is made for the purpose of reducing the grade of the land to the level of the street.<sup>6</sup>

<sup>1</sup> Birmingham v. Allen, 6 Ch. D. 284, affirmed on appeal; Elliot v. North Eastern Ry., 10 H. S. Cas. 333.

<sup>2</sup> Weir & Bell's App., 81\* Pa. St. 208; Altwater v. Woods, 1 W. N. Cas. 28.

<sup>3</sup> Snarr v. Granite Curling & Skating Co., 1 Ont. 102.

<sup>4</sup> Darley Main Co. v. Mitchell, 1 App. Cas. 127; Roberts v. Haines, 7 El. & B. 625; Davis v. Treharne, 6 App. Cas. 460.

<sup>5</sup> Gildersleeve v. Hammond (Mich.), 67 N. W. Rep. 519.

<sup>6</sup> Stimmel v. Brown, 7 Houst. 219; 30 Atl. Rep. 996.

If the adjoining lands are not upon the same grade, but are upon a hillside, the higher land is still entitled to the support of the lower, and consequently the owner of the latter cannot excavate so near to the boundary line as he could if the properties were on the same grade.<sup>1</sup>

Whether an abutting owner is entitled to the lateral support of the adjoining land in a public street, and a city or town is liable for damages to such owner's land occasioned by excavations in grading the street, is a question upon which there is a conflict of opinion. On the one hand it is regarded as subject to the same liability as a private owner of land is.<sup>2</sup> A city or town removing the adjacent support of land abutting on the street, so that in consequence the land falls, is regarded as taking the land for public purposes, and compensation must be made for such a taking. If there are improvements upon the land, and their weight has not conduced to the falling of the land, the damages recoverable from the city or town may include the damage to the improvements.<sup>3</sup>

Where sewerage commissioners were authorized by an act of the legislature to construct a sewer through a street, and land and buildings of an abutting owner were injured by the withdrawal of quicksand beneath the surface of such land which flowed freely into the excavation made for the sewer and was taken out by means of buckets and pumps, so that the buildings settled and cracked, it was held that the commissioners were liable for the injury. The plaintiff did not offer to prove that he owned the fee of the soil in the street where the right to construct the sewer was taken. But, even if he owned the fee,

<sup>1</sup> *Weir & Bell's App.*, 81\* Pa. St. 208.

<sup>2</sup> *Dyer v. St. Paul*, 27 Minn. 457; 8 N. W. Rep. 372; *O'Brien v. St. Paul*, 25 Minn. 381; 33 Am. Rep. 470; *Nichols v. Duluth*, 40 Minn. 389; 42 N. W. Rep. 84; *Armstrong v. St. Paul*, 30 Minn. 399; *Cabot v. Kingman*, 166 Mass. 403; 44 N. E. Rep. 344; *Stearns v. Richmond*, 88 Va. 992; 14 S. E. Rep. 847; *Keating v. Cincinnati*, 38 Ohio St. 141; 43 Am. Rep. 421; *Cin-*

*cinnati v. Penny*, 21 Ohio St. 499; 8 Am. Rep. 73; *Parke v. Seattle*, 5 Wash. 1; 20 L. R. A. 68; 34 Am. St. Rep. 88; *Aurora v. Fox*, 78 Ind. 1; *Meares v. Wilmington*, 9 Ired. 73; 49 Am. Dec. 412; *New Westminster v. Brighthouse*, 20 Can. S. C. 520; 38 Am. & Eng. Corp. Cas. 815; *Lewis on Eminent Domain*, §§ 100, 151.

<sup>3</sup> *Keating v. Cincinnati*, 38 Ohio St. 141; 43 Am. Rep. 421.

the taking of the land for the sewer imposed no additional servitude upon the land under the highway,<sup>1</sup> and no right of any sort was taken in the plaintiff's land. It was held that the defendants had no right to take away the soil of the plaintiff in land they had not taken under the statutes, or to withdraw the support to his land abutting on the street.<sup>2</sup>

There is, however, much authority for holding that a municipal corporation acting under proper legislative authority is not liable for consequential damages to the property of an adjoining land-owner whose lands are not actually taken, occasioned through the grading of a street, there being no want of care or skill in the execution of the work.<sup>3</sup> The State has the authority to adapt a street to easy and safe passage; a city is the agent of the State to do this and is not answerable for damages incurred under such authority.

The adjoining land-owner cannot acquire by prescription any right to abridge the power of a municipality to regulate and change the grade of its streets.<sup>4</sup>

The public authorities are liable for damages to the owner of land abutting upon a proposed street which has not been accepted and for the opening of which no authority is shown. Though the ultimate purpose may have been to open the street, if no order or resolution binding upon the municipal corporation appears, but it is manifest that the object of the public authorities immediately in view was the procuring of gravel for use in other parts of the village, there is a clear liability for the

<sup>1</sup> *Chelsea Dye House & L. Co. v. Commonwealth*, 164 Mass. 350; 41 N. E. Rep. 649; *Lincoln v. Commonwealth*, 164 Mass. 1; 41 N. E. Rep. 489.

<sup>2</sup> *Cabot v. Kingman*, 166 Mass. 408; 44 N. E. Rep. 844.

<sup>3</sup> *Boulton v. Crowther*, 2 B. & C. 708; *Transportation Company v. Chicago*, 99 U. S. 635; *Smith v. Washington*, 20 How. 135; *Cheever v. Shedd*, 18 Blatchf. 258; *Callender v. Marsh*, 1 Pick. 418; *Rome v. Omberg*, 28 Ga. 46; 73 Am. Dec. 748; *Fellowes v. New*

*Haven*, 44 Conn. 240; 26 Am. Rep. 447; *Hollister v. Union Co.*, 9 Conn. 436; 25 Am. Dec. 86; *Delphi v. Evans*, 86 Ind. 90; 10 Am. Rep. 12; *Quincy v. Jones*, 76 Ill. 281; 20 Am. Rep. 243; *Radcliff v. Mayor*, 4 N. Y. 195; 53 Am. Dec. 357, and see cases cited by *Bronson, C. J.*; *Wilson v. Mayor*, 1 Denio, 595; 43 Am. Dec. 719; *O'Connor v. Pittsburgh*, 18 Pa. St. 187.

<sup>4</sup> *Smith v. Washington*, 20 How. 135; *Goszler v. Georgetown*, 6 Wheat. 593.

removal of the lateral support of land adjoining such proposed street.<sup>1</sup>

Under a constitutional provision or statute declaring that municipal corporations shall make compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, one may recover damages to his land resulting from the change of grade of the street upon which such land abuts.<sup>2</sup>

Whether this principle is applicable to the acts of private corporations authorized by the legislature to construct works of a public character, such as canals or railroads, is a question upon which the authorities are not agreed. On the ground that such works, though used by the public, are constructed primarily for the benefit of private corporations who are not public agents, it is held that damages done by them by making excavations and removing the support of adjoining lands may be recovered against them in the same manner as against private individuals.<sup>3</sup> It is competent for the legislature to provide for such damages.<sup>4</sup>

On the other hand it is held that such corporations acting under the authority of the State are not liable for damages occurring to adjoining lands through excavations made in the construction of such works, if these are made in a careful and skillful manner.<sup>5</sup>

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<sup>1</sup> *Buskirk v. Strickland*, 47 Mich. 389; 11 N. W. Rep. 210.

<sup>2</sup> *O'Brien v. Philadelphia*, 150 Pa. St. 589; 24 Atl. Rep. 1047; *Jones v. Bangor*, 144 Pa. St. 688; 23 Atl. Rep. 252; *Ogden v. Philadelphia*, 143 Pa. St. 480; 22 Atl. Rep. 694.

<sup>3</sup> *Cheever v. Shedd*, 18 Blatchf. 258, 264, per Shipman, J.; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Ludlow v. Hudson River R. Co.*, 6 Lans. 128; *McCullough v. St. Paul, M. & M. R. Co.*, 53 Minn. 12; *Richardson v. Ver-*

*mont Cent. R. Co.*, 25 Vt. 465; 60 Am. Dec. 288.

<sup>4</sup> *Dodge v. County Commissioners*, 8 Met. 880; *Parker v. Boston & Me. R. Co.*, 3 Cush. 107; 1 Am. Dec. 709; *Trowbridge v. Brookline*, 144 Mass. 189; 10 N. E. Rep. 796.

<sup>5</sup> *Mercy Docks Trustees v. Gibbs*, 11 H. L. Cas. 686, 713; *Boothby v. Androscoggin & K. R. Co.*, 51 Me. 318; *Hortsmann v. Covington & L. R. Co.*, 18 B. Mon. 218; *Newport & Cincinnati Bridge Co. v. Foote*, 9 Bush, 264.

## CONSTITUTIONALITY OF THE ILLINOIS TORRENS LAND TRANSFER ACT.

The decision of the Supreme Court of Illinois declaring the recent statute of that State<sup>1</sup> unconstitutional, for the reason that it confers upon the Recorder of Deeds judicial powers, whereas the constitution of the State<sup>2</sup> provides that the judicial power shall be invested in certain courts therein named,— has attracted widespread attention and very deep interest. Our present system of land transfer is so cumbrous and expensive as to be unsuited to the commercial character of the age. The Torrens system, as is well known, assimilates the transfer of land to the transfer of shares in a corporation.<sup>3</sup> The principal features of that system are: 1. Ascertaining, in some mode provided, who the existing owner of a given tract of land is; 2. Making a record of that tract of land, of the name of the owner, and the character of his title, in a prescribed mode; 3. Issuing to him a certificate of ownership, by transferring which he may easily and inexpensively transfer his title to the land, very much as a shareholder in a corporation, by transferring his share certificate, transfers his title to his shares. These are the leading features of this system of land transfer; and when we reflect upon its simplicity and obvious inexpensiveness, we wonder that it was not thought of and adopted long before. In the Australian colonies, where it was invented and first put in practice, there are no trammels of constitutional law, such as shackle our legislatures, afford fields for the casuistry of our judges, strengthen greedy monopolies, and arrest the development of institutions. A great abstract-of-title company in Chicago fought the Illinois Transfer Act with all the power and intellect which its money could bring to bear against it. It was, nevertheless, passed,

<sup>1</sup> Ill. Act, June 18th, 1895, Laws Ill., 1895, p. 107.

<sup>2</sup> Const. Ill., Art. 6, § 1.

<sup>3</sup> See the able paper of Prof. Harvey B. Hurd upon this question, 25 Am. Law Rev. 367.

though confined in its operation to Cook County, and even there it could become operative only when approved by a vote of the people,—a restriction whose motive is obvious enough when the large number of country lawyers found in every legislature is considered. It was so put in operation by a vote of the people of Cook County. The Supreme Court of Illinois now say that it is unconstitutional, because it confers judicial powers upon the Recorder of Deeds, acting as Registrar under the act.<sup>1</sup>

The reasons given by the court for its conclusion are thus reported:—

It is contended that the statute contravenes several provisions of the constitution, and is therefore void. One of the contentions is that it confers judicial powers on the recorder of deeds (who is by the act made registrar of titles) and his examiners. If it does, counsel for appellee agree that it violates article 6, section 1, of the constitution, which provides that the judicial powers shall be vested in courts therein named, and the law is therefore invalid, without reference to other objections urged against it. In our view of the case it will only be necessary to decide this one question.

Under the several provisions of the act, if A. B. claimed to be the owner of a lot in the city of Chicago, as devisee, in fee simple, and as such wished to have his title registered as authorized by section 7, his application in conformity with section 11 would be substantially as follows: "A. B., a resident of Chicago, Cook County, Ill., unmarried, is the owner of lot (describing it) in fee simple, not subject to an estate of homestead, unincumbered, subject to no liens or incumbrances; that C. D. claims to own said lot in fee simple, and his post-office address is No.                street, Chicago, Ill.; that this applicant is of the full age of 21 years. (Signed) A. B."

(Sworn to.)

Suppose the applicant claimed such ownership as devisee under the will of John Doe, deceased. If the will was not recorded in the office of the recorder of deeds (the registrar) it would be the duty of applicant to furnish a copy thereof with his application, and any other

<sup>1</sup> The case is *People ex rel. Kern v. Chase*, not yet reported, presumably for the reason that a petition for a rehearing has been filed and is pending. But we find in the *Legal Adviser* (Chicago) of November 11th, what

purports to be a full quotation from that portion of the opinion in which the court, speaking through Mr. Justice Wilkin, gives its reason for its decision.

instruments in his chain of title not then of record in that office. (Part of section 14.) Under other provisions of that section it would then become the duty of the registrar to cause an examination to be made as to the truth of the facts set forth in the application, and also whether the lot was occupied, and if so, the nature of the occupancy. He would next be required to notify C. D. and all other persons whom he might find to be interested by reason of possession or otherwise, and post a copy of the notice on the premises at least ten days before granting the certificate of registration. If C. D., being under no disability, appeared before the registrar in obedience to that notice and set up claim to the lot as the only heir of John Doe, deceased, claiming that the will accompanying the application was not legally executed as provided by the statute, and that it did not by a proper construction devise the lot to A. B., or if he was an infant, lunatic, or under other disability, and no appearance was made for him by guardian, conservator or next friend, it would be the duty of the registrar, aided by his two examiners, to inquire into the matter and settle in the one case the issue made between the parties, and in the other, *ex parte*, the claim of ownership set up in the application. If upon such investigation he should find the facts stated in the application to be true, "and that the applicant is the owner of the land in fee simple as set forth in the application," he must issue a certificate of title and proceed to bring the lot under the operation of the act as hereinafter provided. But if upon such examination he should find that the facts stated in the application are not true, or that A. B. is not the owner of the lot, it would be his duty to dismiss the application without prejudice, returning the paper to the applicant.

Upon the issuing of the certificate, A. B., in the absence of fraud to which he is a party, etc., would hold the lot in fee, free from all others, except: First, any subsisting lease, etc.; second, all public highways; third, any subsisting right of way; fourth, any tax or special assessment; fifth, "such right of action or counterclaim as is allowed by the act;" and sixth, the right of any person in possession of and rightfully entitled to the land or any part thereof or interest therein, adverse to him at the time when the certificate was issued, as provided by section 29. With the exceptions mentioned in this section, neither C. D. nor any other person claiming the lot could commence any action at law or in equity for the recovery thereof, or assert any interest, right in, or lien, or demand upon the same, or make any entry thereon adversely to the title of A. B., unless the action should be brought within five years from that date (section 37); or if the right existed at the time of issuing the certificate, but no cause of action had then

accrued, such party might, prior to the expiration of said five years, file in the registrar's office a notice, under oath, setting forth his interest, etc., and might then bring his action at any time within one year after the right accrued (section 38).

The definition of judicial power given by Judge Cooley in his work on "Constitutional Limitations," held by this court to be sufficiently accurate for the purposes of the question then before the court, which was in substance the same as that now under consideration, is as follows: "The power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws."<sup>1</sup> We do not understand that, under this definition, or under any definition of the term "judicial powers," it is necessary, that the adjudication between the parties shall be conclusive of their rights put in issue, but if the party or officer is clothed with the power of adjudicating upon and protecting the right or interest of contesting parties, and that adjudication involves the construction and application of the law, and affects any of the rights or interests of the parties, though not finally determining the right, it is still a judicial proceeding, or the exercise of judicial functions. The question, therefore, in the supposed case is not whether the registrar finally determines the ownership of the lot, but whether his decision affects the rights of the parties claiming that ownership.

As we understand the argument of counsel for appellee, their position as that the proceeding before the registrar is not to determine the ownership of the lot, but simply to ascertain whether, under the existing facts, the lot shall be brought under the act, and that the determination of the ownership is merely incidental to the ministerial act of bringing the property into registration, and that the courts are left open to all parties claiming any interest adversely to the holder of the certificate of title.

It is nevertheless true that the rights in the case stated of C. D. are substantially and conclusively affected by the decision that A. B. is the owner and entitled to have the lot brought under the act in question. It will not be denied that the issuing of the certificate puts in operation the statute of limitations against C. D., and that it in effect amounts to a determination that if his rights are not asserted in the courts within five years thereafter (unless within the provisions of section 38) he shall be forever barred. In other words if it be true that the issue before the registrar is whether the property shall be registered, and whether the statute of limitations shall from that time begin to run, the decision of

<sup>1</sup> Owners of Land v. The People ex rel., 118 Ill. 309.



that question involves the determination of the ownership of the property; and if it be conceded that the courts are left open to C. D. for a period of five years from that date, the decision nevertheless takes away from him the existing right to bring his action without that restriction. The decision against him that the property shall be brought under the provisions of the act is as fatal to his right of ownership as though that question was finally and conclusively settled, except that he still has a limited time in which to have his title settled in a court of law or equity.

In case of disability at the time the registrar issues his certificate, the right reserved to bring the action within five years may be of no benefit whatever. Section 37 expressly provides that "it shall not be an exception to this rule (that is that the requirement that the action must be brought within five years) that the person entitled to bring the action or to make the entry is an infant, lunatic, or is under any disability, but action may be brought by such person by his next friend or guardian." Let it be supposed, in the case put, that C. D. at the time of the registration is a child one year of age, without guardian, and, of course, incapable himself of procuring the appointment of one. The registrar decides, and issues a certificate which starts the running of the statute of limitations against him. As to that fact his decision is conclusive. When the statute has run C. D. is six years of age, still without guardian, and still incapable of procuring the appointment of one — incapable of knowing or protecting any of his rights; and yet, by the determination of the registrar that A. B. was the owner of the lot and entitled to a certificate of registration, his rights are absolutely and forever barred.

How did the registrar arrive at the conclusion that A. B. was the owner of the property? Clearly by the examination of the facts and by construing and applying the law to those facts, in doing which he adjudicated upon the rights and interests of A. B. and C. D., and decided in favor of A. B. and against C. D. in a matter of most vital importance. It seems to us that the reading of this act forces the mind to the conclusion that it confers upon the registrar and his examiners judicial powers for the purpose of determining the rights of adverse parties. If, as is contended, the duties of the registrar are purely ministerial, why should he have been required to call to his assistance "two or more competent attorneys" to be examiners of title, as his legal advisers? Why, if his duties are merely ministerial, should he be limited in his right to bring the property within the provisions of the act to cases in which he should have the favorable opinion of at least two of these executors? Manifestly the act contemplates that he shall

consider and apply the law to the facts presented by the applicant, and lest he should not be able to do so himself, he is required to call to his aid those learned in law. In the case supposed, whether the will was legally executed, would, to a lawyer, be a simple question, but in its determination it would be necessary to understand and apply the provisions of the statute; and whether, by a proper construction of the instrument, the devise was legally made to a particular person, every lawyer knows, would often become a matter most difficult of solution.

We are not unmindful of the settled rule that there are many cases in which ministerial officers exercise quasi-judicial powers or discretions, and yet the laws conferring such powers are held to be no violation of the constitutional provision under consideration. These cases are referred to and commented upon in *Owners of Land v. The People*; <sup>1</sup> but what we have already said sufficiently distinguishes the powers conferred upon the registrar by this act from all such cases.

It seems to us that it would be difficult to more clearly and positively confer judicial powers upon a person unqualified under the constitution to exercise those powers than is done by this law. This, doubtless, resulted from an attempt to adopt the provisions of a similar law in force in Australia, Canada, England, and perhaps other countries, by which the certificate of title issued becomes conclusive as to the ownership of the property, and in which countries no constitutional or other restriction exists against the legislative grant of such powers upon non-judicial officers.

The powers of the registrar are no less judicial under the statute than those in the countries referred to. The only difference is, there is no valid objection to the validity of the law, while here it is fatal. In re, etc., ex rel. Bond construing "the transfer of land statute," <sup>2</sup> it is said: "The intention of the legislature was obviously to impose the duty upon the registrar to prevent instruments being registered which, in law, as well as in fact, ought not to be registered in the first instance, and to determine the validity of the instruments, as well as the priority of registration in point of time. He has, therefore, to discharge not merely ministerial but judicial duties."

Without further discussion of the question we are of the opinion that this law, for the reasons stated, is obnoxious to the constitution, and therefore void.

The judgment of the court will be reversed and the cause will be remanded to the Circuit Court of Cook County with directions to enter a judgment of ouster against the defendant as prayed in the information.

<sup>1</sup> 113 Ill. 309.

<sup>2</sup> 6 Vic. L. R. 458.

So far as the statute of limitations of five years, contained in the act, is made to run against infants, as well as adults, it might possibly involve a grave question, whether the destruction of the title of an infant, provided some one fails to secure the appointment for him of a next friend, and to bring action for him to assert his title, is not a taking of his property without due process of law, within the meaning of the Fourteenth Amendment to the constitution of the United States,— if it were not for the fact that the act itself, under the head of “Indemnity Fund,”<sup>1</sup> provides compensation not only to infants but to all others whose rights are thus cut off. Besides, there are many statutes of limitation in respect of land which run against persons under disability as well as against persons who are *sui juris*; but, so far as we know, they have never been held unconstitutional and in fact the settled doctrine is otherwise.

But eliminating this, and speaking with reference to the main features of the statute, the soundness of the opinion is open to very grave doubts. It is true that the registrar is required to determine who is the owner of the tract of land in respect of which application is made for a certificate under the act. But for what purpose is he required to determine it? Is he required to determine it for the purpose for which a judicial court determines it in an action of ejectment, or even incidentally in an action of forcible entry and detainer or unlawful detainer? Does his determination take the character of an ordinary judicial proceeding? Is it followed up by any compulsory process? Does he issue a writ of execution, a writ of *habere facias possessionem*, or any other process by which any one in possession is ousted or any one out of possession is put in? Does he do anything more than place upon the public records a mere paper declaration which operates as a public notice to the world, putting in operation the statute of limitations of five years, provided for by the act? In doing this does he do anything more, does he do as much, as the sheriff does when, with an execution in favor of A. against B., he levies upon the horse of C. and sells it to D., in which case the title of D., to the horse, though void

<sup>1</sup> §§ 90 to 93.

in its inception, becomes good under the operation of the short statute of limitations relating to personal property? Does he do anything more than the plaintiff in a judgment does when he sues out execution upon the judgment and levies it upon all the right, title and interest of the judgment debtor in certain lands, which lands belong to an utter stranger to such debtor, and when such debtor has and never has had any interest in those lands?<sup>1</sup> In this last case the void deed would be color of title, within the meaning of statutes of limitation relating to land, in such a sense that a person getting possession under it and holding possession for the period of the statute—generally ten years,—would acquire a good title, provided his possession during that whole period had been continuous, open and adverse to the real owner. Does not the sheriff, in deciding that the horse upon which he levies is the horse of B., the defendant in the execution, instead of the horse of C. whose horse it really is, exercise as much judicial power as does the registrar of deeds under the Illinois statute? Does he not exercise more real judicial power, in that he follows his conclusion by a compulsory act? He decides, and, in the very act of deciding, he enforces his judgment. Does the plaintiff in the judgment, in the second case supposed, who levies his execution upon the supposed right, title and interest of the judgment defendant in the property of a total stranger to both parties,—exercise any judicial power? He exercises a power. He sets the initial stake by his own mere volition, and by his merely wrongful act, though it may not be such a wrong as the law recognizes and punishes,—and by that wrongful act he puts in force the statute of limitations, and the operation of the statute combined with the laches of the real owner of the land, in time destroys the title of the latter; and, in destroying it, does it do any more than

<sup>1</sup> This is not a far-fetched picture. It is done every day. The homestead of the writer in St. Louis was levied on by a mousing old lawyer and sold, under a judgment recovered by him against a total stranger to the title of the writer, his purpose being to effect a collateral object; and the state of

the Missouri law was and is such that the writer could not even maintain a suit in equity to have the sheriff's deed declared a cloud upon his title; the theory being that, as the deed was merely void, it constituted no cloud upon the title; a fallacious theory, as the writer believes.

the Illinois land transfer act does? It is true that in the former case the sheriff is answerable as a trespasser; but he is answerable, not because he makes an erroneous decision, but because he follows it up by a seizure of the property of a stranger to the execution. The plaintiff in the judgment in the second case, in entering upon the land of a stranger which he had presumed to sell and purchase under his execution, might, however, be ousted as a trespasser; and so one having no title to land and yet procuring title to it — if it can be called a title — under the Illinois statute, in like manner, it may be assumed, subject to be dealt with as a trespasser if he takes possession.

The opinion of Mr. Justice Wilkin in the case under consideration, though well written and plausible, is possibly in some respects overreasoned. Especially that part of it which founds an argument on the fact that the registrar is required to call to his aid "two or more competent attorneys," does not seem to be tenable. Every sheriff has, as is well known, a presumably competent attorney as his legal adviser, and he takes no important step, in case of a contest, without the advice of this attorney. Does he therefore exercise judicial functions? Every municipal corporation has a salaried counselor. Do its mayor and other executive officers therefore exercise judicial functions? Every railroad company — every considerable private corporation — is likewise equipped with a staff consisting of one or more men learned in the law, whose advice its agents and managers are continually soliciting before taking any important action; and the same may be said of merchants and ordinary business men. The Governor of the State acts ministerially, and yet he continually calls upon the Attorney-General for his advice; and in many States he is entitled to call upon the Supreme Court for their opinion.

While this question is not free from difficulty, it would seem that the doubts surrounding it are such, and the importance of the question such, that it ought to be re-argued. A constitutional question of such grave importance, arising as a question of first impression, ought not to be finally decided, it should seem, without a second argument. Especially is it true that the conclusion of the Illinois court ought not to be hastily acquiesced in

by the courts of other States having similar statutes. The introduction of the Torrens Land Transfer system promises a great benefit to the people. It tends to meet the spirit of a commercial and business age, in which land, passing out of the system of feudal tenures, has become a mere commercial commodity; and it furnishes an easy, expeditious, inexpensive, simple, and certain mode of effecting land transfers, in place of the cumbersome, expensive, and uncertain mode which we now have; a mode under which every transfer is obstructed by the necessity of a long investigation of the title and the payment of a large fee to a title examiner, or to a corporation keeping an abstract of the records of title within the county. Is it not presumable that, if the men who made the constitution of the State of Illinois could have foreseen such a contingency as this decision presents, they would have excepted this office out of the provision in relation to the judicial power?

But if the opinion of the Illinois court is a sound one, it does not create an insuperable difficulty. It will be competent for the legislature to devolve upon the ordinary judicial courts the duties which, under this statute, it has devolved upon the registrar of land titles assisted by two or more competent attorneys. That will totally obviate the objection of devolving judicial power upon a ministerial officer, assuming it to be a tenable objection.

SEYMOUR D. THOMPSON.

ST. LOUIS.

## NOTES.

SUBSCRIBERS of the London *Law Times* who have not forgotten their Dickens probably felt as if they were meeting an old acquaintance, on reading the title of a case digested in that journal's "Notes of Recent Cases not yet Reported." The case was, "*Dombey & Son, Limited, (in liquidation) v. Playfair & Company and others.*"

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THE VIRGINIA COURT OF APPEALS have lately held that the fact that a juror is a debtor to one of the parties to the cause is not a ground of challenge. The court take the optimistic view that it ought not to be presumed that such a relation would warp the juror's judgment. We take exactly the opposite view, in which we are glad to know that the *National Corporation Reporter* concurs with us.

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HON. GEORGE F. EDMUNDS.—*Case and Comment*, in its January number, begins a series of sketches of eminent lawyers, with a portrait and sketch of Hon. George F. Edmunds, late senator of the United States from Vermont, and one of the most distinguished practitioners at the bar of the Supreme Court of the United States. The excellent portrait which it presents exhibits a striking resemblance to Hon. Robert A. Bakewell, of St. Louis, sometime a judge of the St. Louis Court of Appeals.

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MR. LOUD'S BILL RELATING TO SECOND-CLASS MAIL MATTER. — There can be no possible doubt that the real milk in the cocoanut of the bill introduced into the last House of Representatives by Mr. Loud, of California, known as House Bill No. 4566, enormously increasing the postage on second-class mail matter and hampering the distribution of matter of that kind, was the direct interest of the express companies. The *Albany Law Journal* correctly says: "The real beneficiaries of the measure are the express companies. By the cutting off of competition with the postal service, they would be enabled to increase their

rates, and thus reap a rich harvest." The passage of such a measure would illustrate the extent to which the rights of the people are sold out by their representatives to interested private corporations.

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**HON. HARVEY B. HURD.**— We print as a frontispiece to this number an excellent portrait of Hon. Harvey B. Hurd, of Chicago, author of the celebrated Illinois Torrens law. This portrait is printed by the Chicago Legal News Company, from a half-tone plate made by Hon. James B. Bradwell, the president of that company. Judge Bradwell enjoys the unusual distinction of understanding seventeen different mechanical trades, in addition to being a thorough lawyer and to having earned and deserved the reputation of being one of the best surrogates in this country. If the learned judge understands all his seventeen different trades as well as he understands the trade of making half-tone engravings, he is indeed a phenomenal man. From a late number of the *Chicago News* we take the following brief sketch of Prof. Hurd, showing *Legal* principal titles to honor and distinction:—

He was admitted to the Illinois bar March 7, 1848; was a pioneer abolitionist and Secretary of the National Kansas Committee, which conducted the Kansas war on the part of the North; is senior professor of the Law Department of the Northwestern University; was the official reviser of the Illinois Revised Statutes of 1874, and has been the editor of a revision of the Statutes at every session of the legislature for the past twenty years. He is the father of our great drainage and waterway channel, the author of the celebrated Illinois Torrens law, and has been a leading citizen in this community from the time when the memory of man runneth not to the contrary.

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**THE VENEZUELA ARBITRATION TREATY.**— The treaty between the United States and Great Britain, to which the Republic of Venezuela has formally assented, provides for a judicial tribunal to settle, within limits heretofore named by us, the question of the disputed boundary between the Republic of Venezuela and British Guiana. The United States has appointed Chief Justice Fuller, who is justly complimented by the *Law Journal* of London as being "one of the greatest ornaments of one of the greatest appellate tribunals in the world." The United States has also appointed Mr. Justice Brewer of the Supreme Court of the United States, of whom the same publication says: "Mr. Brewer's impartiality and courtesy while acting on President Cleveland's commission speedily silenced the criticisms which some of his extra-judicial utterances on the Anglo-



Venezuelan controversy aroused in this country." The British Government appointed Lord Herschell, late Lord Chancellor, and also Sir Richard Henn Collins, a judge of the Queen's Bench Division. Some question has been raised in this country and in England as to the expediency of appointing upon such commissions judges who sit in courts having overcrowded dockets, whereby the regular business of those courts is made to suffer. Possibly the public benefit of having the questions in controversy decided by a tribunal so eminent that its decision will be above suspicion and will command universal acquiescence, justifies such appointments. Mr. Justice Nelson, it will be remembered, was taken by President Grant from his active duties on the Supreme Bench of the United States, and made a member of the High Joint Commission which drew up the treaty of Washington under which the arbitration of the claims growing out of the depredations of the Confederate cruiser *Alabama* afterwards took place at Geneva; and Lord Cockburn, the Lord Chief Justice of England, was, it will be remembered, a member of the latter tribunal of arbitration. Mr. Justice Harlan was a member of the more recent Behring Sea Tribunal of Arbitration; so that it is becoming the rule, fortified by precedent, to take eminent judges from their ordinary duties to perform such extraordinary judicial services.

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ELLIOTT ON RAILROADS. — We have received a copy of this monumental four-volume work, written by Hon. Byron K. Elliott, sometime Chief Justice of the Supreme Court of Indiana, and his son, William F. Elliott, and published by the Bowen-Merrell Company, of Indianapolis. Our readers will recall that these learned gentlemen have previously written several very acceptable works. This work came to the writer in the nick of time. He was examining some difficult questions growing out of a railway mortgage foreclosure, and had little time to make a search, and needed a grouping of the latest authorities. He found them all there. This work is built upon a citation of about 25,000 cases, grouped and arranged in an admirable manner, and the text is written in a terse and lawyer-like way. The Elliotts are now entitled to graduate as masters of legal authorship; and their diplomas shall be marked *summa cum laude*.

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OLD JUDGES. — Lord Esher, who attained his eighty-first birthday on Thursday in last week, is the oldest judge on the English Bench in years, and, except Lord Penzance, in judicial standing, having been

appointed a Justice of the Court of Common Pleas so far back as 1868. Two members of the Irish Judiciary still in active discharge of the duties of their offices are senior to the Master of the Rolls in occupancy of seats on the Bench. The Right Hon. H. E. Chatterton, Vice-Chancellor of Ireland, and the Hon. Stearne Ball Miller, Judge in Bankruptcy, were elevated to the Bench in 1867. Judge Miller is Lord Esher's senior by two years, having been born in 1813. The Irish Vice-Chancellor is Lord Esher's junior by four years, having been born in 1819. Lord Esher, Mr. Chatterton, and Mr. Miller were all colleagues in the House of Commons in the sixties, and members of the same political party. — *Law Times* (London).

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HON. E. T. MERRICK, sometime Chief Justice of the Supreme Court of Louisiana, died on the 12th of January, at the age of eighty-six. Only eight days before his death he appeared in the Supreme Court of the State and delivered an eloquent eulogy upon the character of a deceased member of the bar. He was born in Massachusetts, and during the late civil war was a Union man, though he cast his lot with his State after it seceded. He was then a member of the Supreme Court of Louisiana.

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JONES ON EVIDENCE.— This is the title of a new work written by Prof. Burr W. Jones, of the Wisconsin bar and the Law School of the University of Wisconsin, and published by the Bancroft-Whitney Company, of San Francisco. It deals with many of the important topics which are usually classified under the head of evidence; but no one who has attempted a survey of the subject can for a moment suppose that it can be covered in 1997 16mo pages of long primer type, divided into 905 sections. It cites a great many cases — how many it is impossible to tell, for it contains no table of cases. In short, this work is an extension of the so-called "Pony Series." Some time ago the writer of this note received semi-official information that the last of the "Pony Series" had been printed; but this, it seems, was erroneous. Nothing can be said in favor of this form of publication. An idea of the size of these volumes can be given by stating that the amount of type on each page of them is about half the amount of type on the page of a law book of good size printed in type of the same size. The three volumes are sold for \$8.00. This form of publication does not do credit to the author, to his work, or to his publishers. This work should have been issued in two volumes of good law size, printed in small pica type

on clean, white paper. Coming to the substance of the work itself, it affords us pleasure to say that we have used it in searching for the cases on several different topics, and always with satisfaction. We have found it valuable in regard of the fact that it deals with modern phases of what may be called the law of evidence, citing modern authorities, including in many cases citations of articles in the *AMERICAN LAW REVIEW* and other legal publications. It has what we have found to be a good and sufficient index.

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**RESTRAINING LITIGIOUS PERSONS FROM BRINGING SUITS.** — The English Parliament recently passed a law making a provision for preventing well-known litigious persons from bringing vexatious suits. The following, which we take from the *Law Times*, of London, is an illustration of the workings of the statute:—

The utility of the short Act of Parliament which became law last year to prevent abuse of the process of the High Court, or other courts, by the institution of vexatious legal proceedings, has been amply demonstrated by the application of the Attorney-General for an order under the Acts against Alexander Chaffers, to prevent him commencing any further action against any one without an order of the court. That gentleman, since 1891, has brought no less than forty-eight actions against the Prince of Wales, the Archbishop of Canterbury, Lord Esher, several County Court judges, and numerous other persons, in none of which has he been successful, except one brought in the City of London Court to recover the cost of the copy of an affidavit supplied. These facts amply demonstrate the need that existed for such an enactment to save persons from vexatious and vindictive litigation.

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**EVIDENCE: THE X RAY.**—A decision has recently been rendered by the District Court of Colorado, First Division, on a question which sooner or later was bound to come before the courts. It was as to the admissibility of X ray photographs. Their admission in this case was opposed on the familiar principle, so often appealed to in the courts of this country, that this kind of evidence was unknown to the learned lawyers of the Heptarchy, and therefore was no evidence at all. The reasoning did not appeal with much strength to Lefevre, J., who said:—

In addition to these exhibits in evidence, we have nothing to do or say as to what they purport to represent; that will, without doubt, be explained by eminent surgeons. These exhibits are only pictures or maps, to be used in explanation of a present condition, and therefore are secondary evidence, and not primary. They may be shown to the jury as illustrating or making clear the testimony of experts. The law is the acme of learning throughout all ages.

It is the essence of reason, wisdom and experience. Learned jurists have interpreted the law, have classified reasons for certain opinions which in time have become precedents, and these ordinarily guide and control especially trial courts. We must not, however, hedge ourselves round about with rule, precept and precedent until we can advance no further. Our field must ever grow as trade, the arts and science seek to enter in.

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**THE FELLOW-SERVANT RULE.**—The National Corporation Reporter of Chicago, referring to an article in the *AMERICAN LAW REVIEW* on this subject,<sup>1</sup> says that "there is no reason why Illinois should not abolish this rule, although the Illinois courts have somewhat modified it as compared with the announcements of the national courts." The legislature of Missouri, which has been in session during the last winter, abolished this rule as regards railroad companies only. The avowed reason why the statute was not made to extend to all employments was that such an attempt would combine so many interests in opposition to it that it could not be passed. The constitution of Missouri prohibits the enactment of special laws with reference to any subject, where a general law can be made applicable. This is a subject to which a general law can plainly be made applicable, and therefore the Missouri statute seems to be plainly unconstitutional. We doubt whether those of its promoters who were members of the legal profession did not know this, and whether they did not drive ahead with the passage of it merely to make a show of conciliating the laboring classes who were clamorous for its passage. There is scarcely any room to doubt that the Supreme Court of Missouri will hold it unconstitutional when the first case under it is presented which raises that question. The legislators who thus attempted to limit the rule to one employment were "keeping the word of promise to the ear, but breaking it to the hope."

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**LONG JUDICIAL SERVICE: THE YEARS OF CHIEF JUSTICE MARSHALL AND MR. JUSTICE FIELD.**—It is said that Mr. Justice Field, of the Supreme Court of the United States, though he might long since have retired upon full pay, is clinging to the active duties of his office through the motive of equaling or surpassing the years of service on that bench of Chief Justice Marshall. We do not know whether this statement is true or not; but it is the plain truth to say, as our English contemporaries are saying of some of their judges, that when a judge has become

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<sup>1</sup> 80 Am. Law Rev. 840.

so old as to be decrepit, both physically and mentally, the law ought to provide a mode for his compulsory retirement. Apropos of this subject we find in the *Albany Law Journal* a letter by Eugene W. Harrington, of Buffalo, in the following language: —

In carefully perusing the columns of the journal of November 28th, I came upon the statement relative to Justice Stephen J. Field, of the United States Supreme Court, and his thirty-three years of service upon the bench. The article also states "this to be the longest term of service any man has ever enjoyed there." To those who are earnest students of constitutional law there is one man whose name will be remembered, and revered, so long as the constitution itself shall endure, and that name is Chief Justice John Marshall. Because of his intimate association with this wonderful instrument of government during the stormy days of its early existence, is due largely, we believe, its universal acceptance and perpetuity as the organic law. Chief Justice Marshall was appointed by President Adams, January 31st, 1801, and continued in the capacity of chief justice to the time of his death, which occurred in July, 1835. As Bryce in his *American Commonwealth* says: "His *fame* overtops that of all other American judges more than Papinian overtops the Jurists of Rome, or Lord Mansfield the Jurists of England." So, too, in the matter of *years* of service. He still leads. Thirty-four years and six months is the mark set by the great chief justice; and, while I would gladly yield to Justice Field a badge of honor for his many years of service upon the bench, the first place still belongs to that other, "under whose mind the constitution, like a flower, unfolded itself, petal after petal, until it stood revealed in the harmonious perfection of the form its framers had designed," — Chief Justice John Marshall the interpreter of the constitution.

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ONE JURY FOR THE RICH AND ONE FOR THE POOR.—The Missouri special jury law, deserves the opprobrium of enabling a rich man, or a rich corporation, to buy a different jury from that which sits upon the rights of a poor man. By putting up \$75.00 and making a formal motion for a special jury three days before any case is set for trial, a party to that cause may have a jury empaneled consisting of down-town merchants and manufacturers and their clerks and book-keepers. Such juries have proved in too many cases to be juries of rich men for the rich, and to reflect the peculiar prejudices which belong to a peculiar class of men in the community. It is a shameful law that enables one citizen, who has money, to buy his cause before a different tribunal from that provided for the citizen who has not money. It is exactly as though a law were passed allowing a litigant, by putting up \$75.00, to have his cause tried in an appellate court in the first instance, instead of having it tried in a *nisi prius* court. It simply legalizes a species of buying of justice, and — whatever may have

been held of it on constitutional grounds,— it plainly denies to a poor man the equal protection of the laws. In fact, it gives to the rich defendant in a lawsuit the right to have his case presented to a jury controlled by his own prejudices. It is an infamous statute. A bill to repeal it recently passed the Missouri House of Representatives with only eleven dissenting votes, but was defeated in the Senate.

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**PERSONAL TRAITS OF CHIEF JUSTICE MARSHALL.**—One of the most readable articles which we have recently come across is found in the *Green Bag* for December last. It is entitled, "John Marshall, Third Chief Justice of the United States, as Son, Brother, Husband and Friend." It is written by his great-granddaughter, Sallie E. Marshall Hardie, and is compiled from family papers and letters. We like to know all we can about the personal traits of our great men; and this paper gives us insight, from different directions, into the character of the man who, of all others, had the most to do with shaping our government after the adoption of the constitution. Among other things, we are glad to learn that the Great Chief Justice was a good hater, and that he hated Jefferson as much as Jefferson hated him. "His dislike for Mr. Jefferson was intense, and lasted through life. They bitterly disagreed about a matter of vital interest to the University of Virginia; and from that time the Chief Justice never spoke to him, and he sent his five sons to Northern colleges, and his grandsons were also sent north to be educated. Not until his great grandsons were ready for college were any of his blood to be found among the students of that University." Among other charming bits of information with which the paper abounds, is a statement made by John Adams in 1825, to the effect that "his gift of John Marshall to the people of the United States was the proudest act of his life." The wife of Chief Justice Marshall is described as for many years an invalid, seeing few people outside of her own immediate family; and it is added that, but for the loss of her health, she would have been an ornament to society, for she was a beautiful, cultured woman. "That she had a strong character is shown by the influence she had with her husband. He deeply felt that influence, and her death was a blow from which he never recovered." If we may credit a tradition which still exists in the Blair family, this language does not overstate the strength of Mrs. Marshall's influence. This tradition comes down from the mother of the late Gen. Francis P. Blair, who was well acquainted with the Marshalls and was perhaps as intimate with them, when they resided at Washington during sessions of the court, as

any one else. It is to the effect that the Great Chief Justice was very much henpecked by his wife, and that among other petty tyrannies to which she compelled him to submit, was that of removing his shoes before entering the house, without regard to the condition of the streets. The real reason was that Mrs. Marshall suffered from a nervous disorder which made her extremely sensitive to sounds; and her servants were compelled to walk the floors with muffled shoes: they were literally *foot-pads*. His actual, though not his official residence, was Richmond; and it is perhaps not too much to say that he was known and loved by all the inhabitants of that city. In his personal traits and his intercourse with the people he was kind-hearted simple and unaffected. When he died it might almost have been said of him, as it was said of the Duke of Wellington:—

“ O, good gray hair which all men knew;  
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 O, fallen at length, that tower of strength,  
 Which stood four-square to all the winds that blew.”

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**FORECLOSURE OF THE GOVERNMENT'S LIEN ON THE UNION PACIFIC RAILROAD.**— The so-called “ funding bill ” having been defeated in the House of Representatives, for which God be thanked, the Attorney-General took immediate steps to foreclose the mortgage or statutory lien of the United States upon the main line of the Union Pacific Railway Company. The following statement of the proceeding was given out by Attorney-General Harmon to the public press:—

Upon the defeat of the funding bill in the House, the President directed the Attorney-General to commence foreclosure proceedings against the Union Pacific Railway Company, first making the best arrangements obtainable for the protection of the government's interests. Following the lines indicated in his last report, the Attorney-General began negotiations with the reorganization committee. On Thursday, January 21, an agreement was made which will result in immediate steps to foreclose. The chief subject of the negotiations was the protection of the government against the risk of sacrifice of its claim by a sale at a price which would leave nothing substantial after paying prior liens. This protection is now assured by a guaranty that the government shall receive on its lien on the aided portions of the Union Pacific and Kansas Pacific lines, including the sinking fund, not less than \$45,754,000. The sale will be public, so that the government will receive the benefit of any higher bids up to the full amount of its claim, principal and interest. The sum of four and a half million dollars cash was on Thursday deposited with the United States Trust Company of New York by Gen. Louis Fitzgerald, chairman of the com-

mittee, as security, according to the terms of the agreement. The committee agree to bid par for the sinking fund, if it is desired to sell it at any time before the foreclosure sale.

Bills in equity have been prepared, signed by the Attorney-General and Hon. George Hoadley, special counsel, and forwarded to St. Louis, where they will on Friday, January 22, be presented to Judge Sanborn, who has jurisdiction in all the districts, and whose consent to their filing is necessary because the receivers in charge of the property are made parties defendant. They are original bills, and not cross bills, in the pending suits.

Whether they will proceed as independent bills, or be ordered to stand as cross bills in the pending suits will be determined by the judge, but in either event the result will be practically the same, viz.: the sale of the property under the government's lien as well as under that of the first mortgage. The bills will be filed in the districts of Iowa, Nebraska, Wyoming, Colorado, and Utah. Separate bills for the foreclosure of the lien on the Kansas Pacific are in course of preparation. These will be filed in Missouri and Kansas.

The proposed arrangement was submitted to the government directors before it was closed. They all recommended its adoption. The general opinion was thus expressed:—

“The government cannot prudently longer defer the settlement of this matter. The Union Pacific system has already been much curtailed and its revenues have been permanently reduced. Reorganizations of allied and neighboring properties have either been accomplished or are in train for early consummation, and the breaking up of the entire Union Pacific system has been and is steadily progressing. It therefore seems to us inexpedient, if not dangerous, to neglect this opportunity of realizing the sum offered and thus expose the government to a continuous depreciation of its security.”

It is believed that there will be higher bids; but if not, an estimate shows that, crediting amounts already received from the company, the government will at least realize a sum equivalent to the principal of the subsidy bonds, with interest at about  $8\frac{1}{2}$  per cent from their issue to the average date of their maturity, or about 8.45 per cent from date of issue to January 1, 1897.

The minimum of \$45,754,000, guaranteed the government is in cash, so that all relations with the property will terminate upon the confirmation of the foreclosure sale.

The course to be pursued with respect to the Central Pacific has not yet been determined.— *Attorney-General Harmon to the Press Associations, January 22.*

What course the new Attorney-General will pursue with reference to the matter remains to be seen. In the meantime the statements which have been going the rounds of the lay press to the effect that this is a scheme to sacrifice the government's lien to a syndicate, seem to be entirely without foundation. The sale will be a public one, and if any one can get together a syndicate that will bid higher than the syndicate which has been formed has agreed to bid, the law permits them to do so, and neither the Attorney-General nor the marshal of the United States, who will make the sale, will have the right to prevent it.



THE FOREIGN AMERICAN PRESS AND THE ARBITRATION TREATY.—The *Literary Digest* for February 20th contained a number of extracts from the foreign press in the United States on the pending treaty between this country and Great Britain. The Irish press is, naturally enough, vituperatively opposed to it. Their observations are not worth quoting. The *Courrier des Etats Unis*, a French paper published in New York, regards it as “a purely family matter, intended to establish a better relation between two races related to each other,” and takes a somewhat philosophic though pessimistic view of it. The *Novedades*, a Spanish paper published in New York, says that “Russia will certainly use her influence against the treaty.” The *Freie Presse*, a German paper published in Chicago, says: “We do not think that the cause of peace is benefited by a treaty whose real object is to further chauvinistic ambition.” By this expression the Teutonic editor means American chauvinistic ambition. The rest of the editorial is in the same tone, and comes too near the grade of lunacy to be worthy of quotation. The *Staats-Zeitung*, of New York, says, what is probably true, that “the treaty has not gained in popularity here.” On the other hand, the *Westliche Post*, a German paper published in St. Louis, voices the more enlightened sentiment of the American people when it says that “it would be a disgrace if the treaty is not ratified.” While this is the enlightened sentiment in this country on the question, there is still a feeling of acquiescence in the fact that the Senate is scrutinizing the treaty very closely, and is amending it in some of its details. In other words, we feel better satisfied with a treaty which has in effect been made by the American Senate than we would be with a treaty which has been made by Mr. Olney. Beyond question, the events of the past few weeks have tended to cool the ardor of the warm advocates of this treaty. We have seen the English fleet off Canea combined with the fleets of five other powers, open fire on the position of a body of Christians fighting for their liberties against the most odious tyranny that exists in Europe, after a conference with a Turkish official. The fact that England is engaged in this miserable business, so disgraceful to Christian Europe, tends to cool all ardor in the United States for more friendly and intimate relations with that country, and to arouse in us bitter and odious memories of her: the memory of the fact that in 1814 an expeditionary force from that country wantonly burnt our capitol; the memory of the fact that a British fleet wantonly bombarded certain towns on the coast of Finland in 1854, the Finns having committed the offense of being conquered by Russia; the memory of the recent bombardment of Alexandria under the administration of liberal and peace-loving Mr. Gladstone; the memory of the

fact that England is now posing as the greatest Mohammedan power in the world; and all this united to the undoubted prospect that, in the event of a war between this country and England, the latter would astonish us by hurling bodies of her Mohammedan troops into her fortifications at Esquimault. The fact that England is actively assisting the other powers in bolstering up the hideous butcheries of the Armenian Christians and in repressing the aspirations for liberty of the Greek population of Crete, which far outnumbers the Mohammedan population of that island, and the further fact that England is guilty of these infamies because she has previously bound herself by treaties to be guilty of them, deprives her, for the time being, at least, of the sympathy of the most enlightened people of the United States. The indignation and disgust which we feel over the attitude of England in this matter are increased when we remember who the Turk really is: that he is a fish Indian who has become a land Indian in the progress of his migrations southwestwardly from Behring Straits; that he is simply a land Esquimaux; that his language and some of his manners are allied to those of the Esquimaux; that his dog, a hundred thousand of which wallow in their own filth in the Turkish capital, protected by the Turkish police, is the Greenland dog pure and simple, and no other kind of dog; and that, while the Greenlanders' canoe is called a *kaiak*, his canoe is called a *caïque*; and finally that his domestic morals are worse than those of the North American Indians. For those Christian nations to keep the Christians of Crete, contrary to their wills, under the suzerainty of the monster of Yildiz Kiosk, is a spectacle which we must believe because we see it, but which will excite the skepticism of future history.

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**SUITS IN EQUITY TO HAVE CERTAIN MARRIAGE CONTRACTS DECLARED VOID.**—Evidently, the precedent established in California by the celebrated case of *Wm. Sharon v. Sarah Althea Hill* (afterwards *Sarah Althea Terry*),<sup>1</sup> is beginning to bear fruit. It will be remembered that that was a suit in equity brought in 1883 in the United States Circuit Court, to have a certain alleged declaration of marriage between the plaintiff and defendant declared to be false and fraudulent and delivered up to be canceled and annulled, and to enjoin the defendant from the use thereof. While there was nothing new in the equitable remedy applied for, viz.: to have certain documents declared void as being false and fraudulent, and to enjoin the defendant from exercising any rights thereunder, still it was a novel, or, at least, a rare case of equitable

<sup>1</sup> Reported in 11 Sawy. (U. S.) 290.

relief, in that it related to a marriage contract. The United States Circuit Court, it may be remembered, granted the plaintiff the relief prayed for, after a most exciting and sensational contest, and which, as to some of the participants in the litigation, ended most disastrously and tragically. David S. Terry, one of the leading lawyers for the defendant, who married her during the course of the litigation, was killed by the special deputy-marshal Nagle, who was then acting as body-guard to Mr. Justice Field. Terry, at the time of the shooting, was assaulting Justice Field in the Lathrop railroad station restaurant in California. Terry bore a bitter and unrelenting resentment towards Justice Field, as he fancied that the unsuccessful result of the litigation was due to unfriendliness and corruption. The defendant herself is now confined in an Insane Asylum in California, hopelessly incurable.

Another suit, seeking the same remedy and relief, has been brought in the State courts at San Francisco, which promises to afford considerable material for the newspapers in the line of sensationalism. The plaintiff is Thos. H. Quackenbush, a millionaire and widower. The defendant is Mrs. Nancy A. Abbott, a widow, with whom the plaintiff resided for some time as a boarder. The suit is brought to have two contracts of marriage with the interesting widow declared null and void, on the ground that they are false, fictitious and fraudulent. The bill alleges that the story of the marriage has been circulated with the view of getting a portion of plaintiff's estate upon his death. It denies that the plaintiff ever entered into any marriage relations with the defendant, by contract or otherwise. The estates of rich men, nowadays, are so liable to the ravages of unscrupulous and mercenary people, that the precautions taken by plaintiff in the case referred to appear to us in keeping with sound common sense, and, if meritorious, equitable in the extreme. We await with interest the result of the suit.

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**TYPOGRAPHICAL ERRORS.**—It is generally a work of supererogation to apologize for typographical errors unless they result in some serious misstatement, especially in view of the fact that the printer is prone to get new errors into the apology. For instance, one morning the *Memphis Avalanche* contained a local item something like the following: "That old bottle-scarred veteran, General Gideon J. Pillow, returned to the city from Washington, where he has been arguing a great case before the Supreme Court of the United States." As soon as Gen. Pillow saw this article, he hurried to the editorial office of the *Avalanche* and demanded an apology. It appeared the next morning in about the

following words: "We meant to say, in our issue of yesterday, that that old battle-scared veteran, Gen. Gideon J. Pillow, had returned to the city from Washington," etc. We all make mistakes, and some of them are serious ones. What lawyer, who has had a long practice, does not recall some case where he has brought a suit either for the wrong plaintiff or against a wrong defendant, by a mere lapse of memory or a clerical error? What lawyer does not recall some speech, intended to be the greatest effort of his life, wherein, by some strange trick of the mind, one word has been substituted for another, making him appear ignorant or ridiculous? By such a verbal substitution, made by an overworked memory, the writer of this note, in hastily dictating, on a hot day, an address to be delivered before a convention of his fellow-lawyers, referred to the framers of the Federal constitution as having followed the doctrines of De Tocqueville, in creating a government of checks and balances, a writer who was not born until the American constitution had been in existence for eighteen years!<sup>1</sup> Montesquieu was meant, and possibly that reference was scarcely accurate. The truth is that they followed a school of French publicists whose doctrines were at that day fashionable, so to speak. In the last number of this publication, in an article written by Mr. Gunn, of Helena, Mont., occurs a printer's error which, if taken seriously, would convict him of being ignorant of the spelling of two Latin words which are constantly used by lawyers.<sup>2</sup> It was in a quotation from another work, where the expression was used, "between contracts which are merely *malum prohibitum* and contracts which are *malum in se*." It occurred to the editor of the REVIEW, who was the author of the work from which the quotation had been taken, that it would be more precise to make the Latin words agree in number with the English word "contracts;" in other words, to make the expression read, "between contracts which are merely *mala prohibita* and contracts which are *mala in se*." So he undertook to make that change in the proof, but the capable printer corrected his correction so as to make it read, as it appears in type,—putting upon the author of a work on corporations in six volumes, and also upon Mr. Gunn, the gross imputation of being unable to handle this simple Latin expression. Although an editor or author in time becomes callous to typographic errors, yet a bad one never fails to visit him with repeated pangs. There is one consolation in the prospect of death: it is that we shall no longer be punished with typographic errors; they will not make us turn over in our graves.

<sup>1</sup> 30 Am. Law Rev. 678.<sup>2</sup> 31 Am. Law Rev. 26.

**JUDGES OF THE SIXTH FEDERAL CIRCUIT.**—At the banquet to Mr. Justice Harlan, which took place at Cincinnati, October 3, 1896, one of the toasts was, "*The Circuit Justices and Judges of the Sixth Circuit during the old regime: McLean, Swayne, Matthews, Emmons, Baxter, Jackson.*"

It was responded to by Alfred Russell, of Michigan. His response — too good to be lost — was as follows:—

It affords me pleasure to be present to-night, and to join in doing honor to the distinguished judicial officer now presiding in this Circuit.

Nothing in our customary law is more agreeable than having banquets, and praising each other while we are alive; because, you know, as Mark Twain says, "we are dead such a long time!" I have a friend who declares that he would rather have an ounce of *taffy* in his lifetime than a pound of *epitaphy* after he is dead.

I am now to indulge a little in *both*, and to speak of the former justices and judges of this Circuit,—remembering that it is the privilege of the Bar to sit in judgment on the Bench! They were all remarkable men in their different ways. (One half, *of course*, from Ohio!) I tried cases before them all, and was honored by their confidence and friendship and by their not infrequent presence as guests at my house.

Mr. Justice McLean went upon the bench a few months before I was born, but I was often in his court the last eight years of his incumbency. The first time I came to this city was to argue a case before him,—just forty years ago; and I have here in my hand a letter from him about that case, dated November 10, 1856, and which I have treasured all these years, *in perpetuam rei memoriam*. It was written from "Chapel Wood," the name of his seat here.

In his first inaugural, Lincoln said that the Circuit of Mr. Justice McLean had reached the dimensions of an empire, and that relief was required from Congress. The Justice was a man of commanding presence on the bench, and exceedingly courteous to the bar. While not a learned lawyer, he possessed sound sense, strong judgment, comprehensive views of things, and steady application; and, during his long career, gave eminent satisfaction to the community and the profession. When holding court at Detroit in 1856, he received nearly 200 votes at the Fremont (Philadelphia) Convention for the presidency, and evinced much disappointment at not attaining the nomination. His fame rests largely on his dissenting opinion in the Dred Scott case.

Mr. Justice Swayne was quite the opposite of his immediate predecessor. He had not had so varied an experience in public affairs, but was a far more thorough lawyer. He was extremely familiar with the adjudged cases, and, as he told me, emptied his commonplace book

into his opinions. His style was peculiar; abounding in short pithy sentences. He was not only a great lover of the authorities, but of all literature. His relations with the bar were warm and affectionate. He was an ardent Federalist in his constitutional views.

The coming of Mr. Justice Matthews to the bench was a very fortunate event. He was my personal friend, and I labored hard to secure the odd vote for his confirmation. This reminds me of the only witticism which enlivened the arguments before the famous eight to seven Electoral Commission: Mr. Matthews said the College of Cardinals, when electing a Pope, is supposed to be enlightened by the presence of the Holy Ghost, but the Spirit resides chiefly in the *odd man*!

The chairman of the Judiciary Committee, who opposed him, for alleged sympathy with corporations, too late expressed his contrition over an open grave. For, sir, it turned out that few men in our judicial annals have surpassed Mr. Justice Matthews in impartiality of decision, capacity for labor, adequacy of learning, and discrimination in judgment. He died after only seven years of service; and, as the poet says:—

“ Ne’er to the chambers where the mighty rest,  
Since their foundation, came a nobler guest.”

Let us now turn to the departed Circuit Judges.

Judge Emmons was a man of very unusual learning as a case lawyer. He literally read nothing else but law. He was also a very eccentric man, and hardly possessed of what we call the judicial temperament. Ben Butler said of Rockwood Hoar (Grant’s Attorney-General), when he was a judge in Massachusetts, that he always acted as if he wanted to turn both sides out of court with costs! Judge Emmons always wanted to run both sides without being content simply to decide.

Judge Emmons was a master of the rare and difficult art of easy, elegant and effective speech, and his magnificent qualities as an advocate he carried with him to the bench. Untiring in his own labors, he was extremely impatient of any want of preparation at the bar, and sometimes mortally offended us by his trenchant criticisms. At the same time, he was a man of great kindness of heart and agreeable social qualities.

Judge Baxter’s arrival on the bench was like the rising of the red planet Mars above the horizon! A man of great natural endowments, accompanied by an imperious will, his arbitrary determinations sometimes filled us with consternation, and we wondered *what* he would do next!

I well remember a hair-raising tilt between him and Messrs. Lothrop and Joy, in my city, the veterans of our bar.

If he had had the advantage of an early training in law and letters, in less troublous times, he would have been a great judge. As it was, his strong love of justice made up for the absence of some other judicial qualities.

Circuit Judge and Supreme Justice Jackson, by the fullness of his learning, the amenity of his manners, the justness of his conclusions, and the peculiar charm of his social nature, fairly took our hearts by storm.

He was a model judicial officer: most patient in investigation, thoroughly grounded in principles; familiar with the sources of knowledge, rarely erring in results, strongly Federal in constitutional interpretation. His untimely departure was deeply deplored.

These men — ornaments of our common profession, — all served well their generation. They are now in that undiscovered country, where there is, as Whittier says,

“ No doubtful balance of rights and wrongs,  
Nor weary lawyers with endless tongues.”

(Do not misunderstand me. I would not intimate that lawyers as well as judges do not go to the bowers of bliss!)

Before closing, I wish to make mention of Mr. Justice Harlan's dissent in the Civil Rights case, and in the late Louisiana case of *Plessy v. Ferguson*; — nobly vindicating the rights of colored citizens under the amended constitution.

The merciless French satirist, Rabelais, tells us of a banquet to D'Aguesseau, the great Chancellor of France, at the end of his long and brilliant service. He was there asked how it was that he had always satisfied the profession and the people, and he replied, “ *Oh, I just threw dice.*”

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STATUTE REVISION IN MISSOURI AND WISCONSIN. — The Missouri legislature recently defeated a bill to provide for a revision of the statute law of that State by means of a commission of three men learned in the law and at an expense of \$30,000. The defeat of the bill is understood to have been due to considerations of economy. In plain words, it is a painful reflection upon the kind of a legislature we have had in Missouri, which is quite as good, and possibly better, than some of its predecessors. There has been no revision of the statute law of Missouri by a competent hand since the revision of 1865. That law is now in a very unsatisfactory state. The constitution requires a revision to be made by the legislature every ten years. In 1879, and again in

1889, that revision was made by legislative committees; and, considering the short time and shorter means at their disposal, it is remarkable that they succeeded so well. In each case the revision was, under the circumstances, very creditable to its authors. What is really needed is an expert revision by competent men who shall have plenty of time and means for the performance of their task. Such a revision would tend to reduce the statute law into a state of greater harmony and consistency, without changing its substance or altering its policy.

Wisconsin has done better. That State has been revising her statutes by means of a commission. The following suggestions, by Hon. J. R. Berryman, one of the commissions, are taken from the report made by the commissioners to the legislature in submitting the revising bill:—

In so rewriting the laws of 1879 to 1895, we have found that, notwithstanding many years of constant use of the statutes and the experience gained by twice preparing them for publication, the labor of so doing had been much underestimated, and that the time since the close of the session of 1895 has been insufficient to permit the performance of that work in accordance with the standard which we had hoped to attain. That labor has been greatly increased because of the inartificial form in which many of the laws have been expressed, because many of them are enacted without regard to their relation to or effect upon the body of the law to which they relate or the legal system or policy of the State. The result is conflicting legislation, overlapping provisions, and uncertainty as to the state of the law. This produces so many and important consequences that it is well worth while to consider whether a remedy can be found. Among the consequences directly attributable are largely increased litigation and the resulting public and private expense; the necessity for frequent revision or compilation of the statutes, and a lack of stability in the law. These results are unavoidable where legislative sessions are short, the amount of business large and the number of experienced legislators limited. We may perhaps be allowed to suggest that the remedy lies in providing for a small body of trained men to whom shall be intrusted the duty of passing upon the form and validity of measures which have reached that stage of legislative action which is equivalent to an approval of them, and whose duty it shall be to put such measures in proper form, as well as to suggest the amendment of other provisions affected by them, regard being had to what is already enacted on the subject, to what the common law is, to the construction given previous legislation germane thereto, the mischief sought to be remedied and the efficiency of the remedy proposed. With the conclusion of such a body before it and the reasons therefor, the legislature would be inestimably aided in the performance of its duties, needless and harmful changes in the statutes would be lessened, uncertainty as to the effect of laws would be diminished, the State and its citizens saved large expenditure of money, and other results attendant upon uncertainties and lack of stability in the law will be avoided. It is safe to say that the State will not long maintain a harmonious, systematic and well-expressed body of statute law until some such course as is suggested is adopted. The necessity of



such a committee or body is much increased by the adoption of the amendment to the constitution prohibiting special legislation. All such special matters must now be covered by general laws. The result is that measures essentially local are passed under the form of general laws, without regard to the effect they may have upon other localities or upon the body of the general law. The judiciary committees are so overwhelmed with the great number of bills submitted to them, and their duties as legislators, that they have no time whatever to devote to the question of the general effect and harmony of proposed measures. It is beyond the scope of our duty to do more than suggest the matter, leaving the remedy to those upon whom is devolved the duty of enacting laws.

RESOLUTIONS OF RESPECT TO CHIEF JUSTICE MARSHALL. — The following extract from *Hazard's Pennsylvania Register*,<sup>1</sup> seems to be worthy of publication, in view of the fact that an account of the proceedings does not appear ever to have found its way into current legal literature. It is interesting as showing the names of nearly all the great lawyers of the day in Philadelphia, and doubly so as embodying one or two very fine thoughts by the Great Chief Justice. It is said that this meeting led up to the painting of the well-known portrait of Chief Justice Marshall by Inman for the Law Association of Philadelphia. We are indebted for the extract to Hon. Francis Rawle, of the Philadelphia bar, for many years the moving spirit of the American Bar Association.

#### RESPECT TO CHIEF JUSTICE MARSHALL.

At a meeting of the bar of Philadelphia, held in the Circuit Court Room on the 30th of September, 1831, William Rawle, Esq., was appointed chairman, and John Sergeant, secretary.

The following resolution was unanimously adopted:—

*Resolved*, That a committee be appointed to wait upon Chief Justice Marshall, and express to him the reverence of the bar for his pre-eminent character, talents, and services, and request him to honor them with his company at dinner at such time as may be convenient to him.

The following members were appointed the committee, to wit:—

WILLIAM RAWLE,  
JOHN SERGEANT,  
HORACE BINNEY,  
P. S. DUPONCEAU,  
GEO. M. DALLAS.

WM. H. TOD,  
R. PETERS,  
C. J. INGERSOLL,  
JOSIAH RANDALL.

*Resolved*, That the Hon. Judge Hopkinson be requested to unite with the committee in carrying into effect the above resolution.

At an adjourned meeting at the same place on the first day of October, 1831, Mr. Rawle, from the committee appointed yesterday, reported that the committee, together with Judge Hopkinson, who in compliance with the wishes of

<sup>1</sup> Vol. 8, pp. 237-8.

the bar, united himself with them, had waited upon Chief Justice Marshall, and by their chairman, communicated to him the resolution of the bar, with the following address:—

SIR:—The bar of Philadelphia are much gratified by the opportunity which your visit to this city affords us of testifying the high respect and profound veneration for your character felt by us all.

We cannot but consider the whole nation indebted to one who for so long a series of years has illuminated its jurisprudence, and enforced with equal mildness and firmness its constitutional authority, who has never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the full extent that duty required.

In respect to many of us, your exercise of the high office of Chief Justice of the Supreme Court was anterior to the commencement of their professional existence. With some, the recollection of your appointment revives the scene of the satisfaction that it gave; with all, there is a perfect conviction, that the station never was or could be better filled.

It has been noticed with infinite gratitude to the great Dispenser of all earthly bounties, that the hand of time, though it may affect the body, has not diminished those great powers by which the mind of the individual whom we address, has been so long, so eminently distinguished.

As a testimony of the sentiments we entertain, the bar respectfully solicits the honor of your company to a dinner, on any day you may think proper to name, agreeably to the following resolution this day adopted.

WILLIAM RAWLE,  
JOHN SERGEANT,  
HORACE BINNEY,  
PETER S. DUPONCEAU,  
W. H. TOD,  
GEO. M. DALLAS,  
CHARLES J. INGERSOLL,  
RICHARD PETERS,  
JOSIAH RANDALL.

To the Honorable JOHN MARSHALL,  
Chief Justice of the S. C. U. S.

To which Chief Justice Marshall made the following reply:—

It is impossible for me, gentlemen, to do justice to the feelings with which I receive your very flattering address, nor shall I make the attempt; to have performed the official duties assigned to me by my country in such a manner as to acquire the approbation of so respectable and respected a bar as that of Philadelphia, affords me the highest gratification of which I am capable, and is more than an ample reward for the labor which those duties impose. I dare not hope that my services or ability to continue them, entitle me to the favorable sentiments which your kindness has expressed, but I shall always recollect the expression of them with a degree of pride and satisfaction which few occurrences of my life have inspired. Might I be permitted to claim for myself as well as for my associates, any part of the liberal consideration your partial favor bestows it would be that we have never sought to enlarge the judicial

power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.

My state of health does not permit me to indulge in the pleasures of society, and I know not how long I may continue an invalid.

I must therefore decline your polite invitation to dine with you, and entreat you to believe that in doing so, I submit with infinite reluctance to a privation which I cannot avoid.

With great and respectful esteem, I am, Gentlemen,

Your obliged and obedient servant,

J. MARSHALL.

Mr. Rawle, from the same committee, reported the following resolutions which were unanimously adopted:—

*Resolved*, That the members of the bar of Philadelphia will in a body, wait on Chief Justice Marshall, and that he be requested to receive them in the United States Court-room at such time as may suit his convenience; and that the chairman take the necessary steps to carry this resolution into effect.

*Resolved*, That the chairman at this meeting be requested to wait on Chief Justice Marshall and express to him the request of the bar of Philadelphia that he will permit his portrait to be taken.

*Resolved*, That a committee be appointed to obtain the services of an eminent artist of this city to carry into execution the purpose of the foregoing resolution should Chief Justice Marshall assent thereunto.

*Resolved*, That these proceedings be published.

**DEATH OF SIR TRAVERS TWISS.**—The death of this eminent authority on international law deserves more than a passing notice. The following brief sketch of his life and works is taken from the *Law Journal* of London:—

Sir Travers Twiss died on the fourteenth inst., at his residence in Fulham, in his eighty-eighth year. The son of a clergyman, the Rev. Robert Twiss, of Trevallyn, Denbighshire, Sir Travers Twiss was born at Westminster on March 19, 1809. At the age of seventeen he went to University College, Oxford, and in 1830 appeared in the first class in mathematics and the second class in classics. He was soon afterwards elected Fellow and appointed tutor of University, and continued to reside in college for many years. In 1835 and the two following years he was Public Examiner in Classics, and in 1838–39 and 1840 in mathematics. Having become a Fellow of the Royal Society in 1838, he succeeded, in 1842, Herman Merivale as Drummond Professor of Political Economy. He published a volume entitled "A View of the Progress of Political Economy in Europe since the Sixteenth Century," which appeared in 1847. He had already, in 1846, begun the series of literary productions on questions of international law, of which he subsequently became so prolific an exponent, and published an essay on the Oregon question. In 1848 he published a treatise on the relation of the Duchies of Schleswig and Holstein to the Crown of Denmark and the German Federation. Two or three years later the country was excited by the establishment of a Roman Catholic hierarchy in Great Britain,

and Dr. Twiss expounded the cause which had been taken up by Lord John Russell, in a little treatise entitled "Letters Apostolic of Pius IX, considered with reference to the law of England and the law of Europe." Adopting Niebuhr's views on early Roman history, he published in 1837 an epitome of that great historian's work, which he followed up with an edition of Livy with Latin notes. In 1852 he was appointed to the Professorship of International Law at King's College, London, which he resigned after three years' tenure, to succeed Dr. Phillimore in the Regius Professorship of Civil Law at Oxford, which he held for fifteen years, and in which he was succeeded by Mr. James Bryce. Sir Travers Twiss became an advocate of Doctors' Commons in 1840, and was called to the Bar at Lincoln's Inn in the same year. In 1849 he was made Commissary-General of the city and diocese of Canterbury, and in 1852 was appointed Vicar-General of the Archbishop. On the promotion of Dr. Lushington to the office of Judge of the Court of Arches in 1858 Dr. Twiss was made Chancellor of the diocese of London, and in 1862 Advocate-General of the Admiralty. By the passing of the Probate and Divorce Acts of 1857 Doctors' Commons became a thing of the past, and in the following year Twiss became Queen's Counsel. In August, 1867, on the promotion of Sir R. Phillimore, he became Queen's Advocate-General, an office since abolished. In the November of the same year he obtained the honor of knighthood. Few have served on so many Royal Commissions and other public inquiries as Sir Travers Twiss. In 1852 he sat on the commission which inquired into the regulations of the college of Maynooth; in 1867 on that which investigated the laws of neutrality; in 1868 on the Naturalization and Allegiance Commission which resulted in the two statutes passed in 1870; and, in 1869, he served on yet another which dealt with the law of marriage in Great Britain and Ireland and in the British colonies, and a still further commission of which he was a member was that on the Rubrics. He was also one of the commissioners to settle the boundary lines between the provinces of New Brunswick and Canada. The reputation of Sir Travers Twiss as a jurist was European, and in 1884, at the request of the King of the Belgians, he drew up a constitution for the free State of the Congo; and in the following year, at the desire of Lord Granville, then at the foreign office, he acted as legal adviser to the British Embassy during the West African Conference at Berlin. He had published lectures in 1856 on International Law, and written more elaborately in a treatise published in 1861 on "The Law of Nations Considered as Independent Political Communities," of which a second edition was issued in 1884. His principal contributions, however, to this voluminous literature are the two volumes on 'The Law of Nations in Time of Peace' and "The Law of Nations in Time of War." These both reached second editions — the latter in 1875 and the former in 1884. The work was translated into French by himself, with the assistance of M. Alphonse Rivier, Professor of the Law of Nations at the University of Brussels. Another work which proceeded from his fluent pen was 'The Black Book of the Admiralty,' published in 1874. He also contributed articles to the "Encyclopædia Britannica," to the *Nautical Magazine*, to the *Law Magazine and Review*, and *La Revue de Droit International*, which he helped to establish. He was also vice-president and one of the founders, in 1872, of the Institut de Droit International, and was one of the principal promoters in the following year of the Association for the Reform and Codification of the Law of Nations.

APPELLATE PROCEDURE IN THE UNITED STATES AND MEXICO — We have received a very interesting monograph, being an address delivered by Hon. L. G. Kinne, Chief Justice of the Supreme Court of Iowa, at the annual meeting of the Bar Association of that State, held at Davenport last July. It is entitled, "Procedure and Methods of the Courts of Final Resort of the Republic of Mexico, the United States of America, and of the Several States and Territories of the Union." The learned judge took pains to obtain accurate information upon the subject of his paper from local sources: in the case of the Republic of Mexico, from the United States consul resident at the city of Mexico and the Mexican Minister resident at the city of Washington; in the case of the Supreme Court of the United States and the Supreme Courts of Iowa, Ohio, Pennsylvania and New Hampshire, from associate justices of those courts; and in the case of every other court considered in his paper, from the Chief Justice of the court. His paper deals with the number of judges of the courts of last resort in Mexico and in the different states and territories; of their terms of office, salaries and other compensation; of the terms of their courts; of their practice in regard to the printing of records, abstracts and arguments; of their practice in regard to the submission of causes; of their practice in regard to oral argument; opinions as to the value of oral argument; how cases are assigned to the judges for the writing of opinions; of the method of procedure by the judges after causes are submitted; the number of opinions filed in each of the courts with which he deals, in the year 1895; of the practice in regard to rehearings; some of the rules of the courts, as especially rules as to advancing cases; and finally, the conclusions of the author.

This pamphlet is replete with interest. It fills fifty-five printed pages, and is therefore too long to be republished in full in this REVIEW; but we hope to print portions of it in future numbers. The conclusions of the learned judge, after this most painstaking and commendable investigation, are summed up as follows: —

1. The best method is to have every judge read in full all the record abstracts and arguments in every case decided by the court. This is only possible where the business is such as will admit of it, or where the court disposes of only such a number of cases as it can under that system. I am quite willing to admit that no court of five or six judges, or a less number, can follow this plan thoroughly and sit and hear arguments five or six months in the year and write opinions in five or six hundred cases.

2. I am decidedly in favor of the plan of the court setting a few cases for oral argument, hearing them, and then adjourning for a sufficient length of time to decide them and write opinions in them, and then hearing another assignment argued and adjourn and dispose of them, and so on through the

docket. This plan is desirable from many points of view; it would bring the decisions immediately following the submission of the cases — a result always desirable. It would bring the judges together more and tend to more discussion of the cases before and during the time the opinions were being prepared. Under this plan the oral arguments would be fresh in the minds of the judges, and hence of much greater benefit than they can possibly be under our present system. Of course, this plan would require all of the judges to reside at the capital and the salary should be increased so that they could afford to do so.

3. After the judges have all read the record and arguments, their views should be made known to their associates in writing, or in consultation, before the case is written, and the case discussed and a conclusion reached as to how it should be decided. Of course consultation should follow also after the opinion is prepared, when it should be read to the entire court for consideration and criticism. It is important to understand that if our plans should be changed in the particulars above indicated, that it would be impossible for the judges to write as many opinions as under the present system. This is easily understood when we consider that the time devoted to reading cases would be doubled, and that the time actually consumed in hearing oral argument would be much more than is needed now. But I firmly believe that we had better write a less number of opinions and pursue the plan indicated.

4. The law should be so changed as to require the court to file written opinions only in cases where the decree or judgment of the lower court is reversed, leaving it optional with the court to write and file opinions in cases affirmed when it deemed it desirable. This plan is followed in several States with much satisfaction to all parties and it is impossible to discover any valid argument against it. Take a recent Iowa report and we find one hundred and fifty-three cases therein, of which one hundred and eleven were affirmed, and forty-two reversed. Of those affirmed more than three-fourths of the opinions were based upon and followed previous cases, and the opinions contain nothing of value as precedents. The only excuse for writing opinions in such a multitude of cases is that our statute requires it. If the legislature in its wisdom would so change the law as to permit, in all cases of affirmance, a note of the decision to be entered in the announcement book without more, the vexed question of relieving the Supreme Court of this State of the great burden of cases which come to it would be solved for many years to come, and that without the creation of an additional office, or the addition of a dollar's expense to the burdens of the tax-payers. I respectfully submit the facts heretofore stated, and my conclusions based thereon, for your consideration and action.

Among the interesting tables compiled by Judge Kinne is one showing the number of cases decided in each court from which he secured a report, during the year 1895, and the number of opinions per judge, if the work had been equally divided. The lowest number of opinions per judge is found in New Mexico, which is eight; but in this territory the judges of the Supreme Court are also required to hold the *nisi prius* courts. The highest number of opinions per judge is in Michigan, where the enormous

number of 130 per judge was reached. Next to Michigan comes North Carolina with 127 per judge; next to North Carolina, Pennsylvania, with 111 per judge; next to Pennsylvania, Alabama, with 110 per judge. In Georgia and in Minnesota the number was 100 per judge; in Missouri the number falls to 55 per judge; in Massachusetts to 54; in Maryland to 20; in Maine to 15; in Ohio to 14, and in New Hampshire and Nevada to 13. It would be misleading, however, to judge of the amount of work done by the judges of these courts, by the number of their opinions. In many of them opinions are written only in important cases; the rest are decided without the writing of opinions. In others, and notably in the New England States, the judges of the courts of last resort do *nisi prius* as well as appellate work. In some of the courts which sit in two divisions, like the Supreme Court of Missouri, there is a further arrangement which involves a considerable waste of public time, but which is necessary in order to secure uniformity of decision; which is that, whenever a judge in a divisional case dissents, the case may, on motion, be re-argued before the court in banc. And in these courts other important cases are often transferred to the court in banc on motion for re-argument.

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THE NEW GENERAL DIGEST.—It affords us great pleasure to communicate to those of our readers who have not otherwise learned the fact, that a new departure has been taken by the Lawyers' Co-operative Publishing Co., of Rochester, N. Y., upon the lines suggested by us. Our complaint, both with regard to the General Digest and the American Digest, has been that they are digests of the decisions as they appear in the *unofficial* reports, and that they do not cite the official reports except in those cases where the official volumes come out prior to the time of their going to press with the annuals of these digests. The result is that we have an annual digest based largely upon unofficial reports. Now, in making a brief, or in writing a judicial opinion or a book, it is necessary and proper to cite the official reports. But in collecting material from these annual digests it is necessary in, let us say, nearly half the cases, to make a separate search for the official reports in order to insert the proper citation; which search is long, tedious, expensive, and productive of mistakes. Another objection to digesting decisions before they have been officially published is that, in some cases, they never are officially published; but the opinion is recalled, or a motion for rehearing is granted, or the case is otherwise in some way prolonged, and in the meantime it is settled out of court,

and there is no judgment in conformity with the opinion, but the opinion is merely an experimental document, of no real authority under the rule of *stare decisis*. We are able to state, as a fact, that this applies to many cases which have been previously digested in the General Digest and in the American Digest from publications made in the West Publishing Company's "Reporters." The conclusion from this experience manifestly is that no case ought to be digested in any permanent form until it has been officially reported, where there is an official reporting of the decisions of the court. If this policy had been adopted in the first instance by the West Publishing Co. and by the Lawyers Co-operative Publishing Co., with regard to the annuals of their respective digests, we should not have been obliged to run the hazard of citing decisions which are no decisions; nor should we have been obliged to resort, in order to search for the official reports, to that abominable expedient of the St. Paul house known as the "Blue Label Book."<sup>1</sup> To remedy this unsatisfactory state of things, the Lawyers Co-operative Publishing Co., of Rochester, have at last had the courage to make a new departure in their General Digest, by which they confine the annual volumes of that work to cases which have been officially reported. We said the annual volumes, because heretofore they issued annuals. But now their permanent volumes are to be *semi-annuals*. Their scheme is now this: To issue their temporary volumes, designed to keep abreast with the work of the courts, in the form of *quarterlies*, bound in paper covers. These, if taken separately, are charged for at the rate of \$4.00 a year, or \$1.00 for each quarterly volume. Then, every six months, they will issue a permanent volume, which will include no case which has not been officially reported, but which, of course, will embrace the latest cases which have been officially reported. These semi-annual volumes are sold at \$6.00 each; but the subscriber

<sup>1</sup> Point is given to the above by a fact which came to the writer's attention but two or three days ago. He found in the General Digest a reference to a Missouri case embodying an important proposition of law relating to the negligence of municipal corporations. After a search for the official report, embodying the labor of at least half an hour, he found it; but he found it in the form of a decision of the Supreme Court of Mis-

souri *in banc*, dismissing the appeal, because it had not been properly taken. The fact probably was that an opinion had been written in one of the divisions of the court; that it had been unofficially reported in the "Reporter Series," and as such digested by the Co-Ops.; that the case had then been removed to the court *in banc*; and that there the court had discovered that it had acquired no jurisdiction at all.



to these semi-annual volumes gets the quarterlies or temporary volumes without extra charge. In other words, he gets the whole for \$12.00 a year.

This scheme is the most satisfactory scheme that has been or can be devised, from every point of view. It gives us the temporary digests of the latest work of the courts in the form of quarterlies, which issue often enough, which are much more convenient of search than the scattered pamphlets which were previously issued semi-weekly, and which were being continually lost in the mails. For the purpose of being abreast temporarily with the work of the courts, a quarterly digest is issued often enough. Then, the semi-annual volumes give us the work of the courts with references to the official reports as that work finally stands, but with citations to all unofficial reports, including law journals, etc., where any particular case is to be found. It ought to be borne in mind that important English and Canadian cases are included in the General Digest. We have been put upon the track of some very important decisions of those courts on questions arising in equity jurisprudence, such as injunctions against trades unions, trademark cases, and the like, through the columns of the General Digest.

## NOTES OF RECENT DECISIONS.

**CONSTITUTIONAL LAW: IMPOSITION OF ATTORNEY'S FEE UPON RAILWAY COMPANY FOR FAILURE TO PAY DEBTS WITHIN A PRESCRIBED TIME.**— In the case of *Gulf &c. R. Co. v. Ellis*,<sup>1</sup> the Supreme Court of the United States hold, in an opinion written by Mr. Justice Brewer, that a statute of Texas providing that railroad companies failing to pay claims less than \$50 for labor, damages, overcharges on freight, or for stock killed, within thirty days after presentation thereof, shall be liable for an attorney's fee not exceeding \$10, is void, as depriving such companies of the equal protection of the law. The opinion is sound and just. The legislature of Texas singled out railroad companies and imposed upon them an arbitrary and vindictive rule, not imposed upon other debtors, when there was nothing in their situation different from that of other debtors, requiring the imposition of such a rule. In giving the opinion of the court, Mr. Justice Brewer, among other things, said:—

The Supreme Court of the State considered this statute as a whole, and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them when, for like delinquencies, it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts, as other litigants, under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right, while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.

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**CONSTITUTIONAL LAW: VALIDITY OF SUNDAY CLOSING LAWS RELATING TO BARBER SHOPS.**— It is perhaps known that the members of that use-

<sup>1</sup> 17 Sup. Ct. Rep. 255.

ful, well-informed and loquacious profession, the barbers, have, through their trades unions and their influence upon their customers, prevailed upon the legislatures of several States to enact statutes requiring barber shops to keep closed on Sunday, or else to close at a particular hour on that day, say 12 o'clock or 1 o'clock. At the bottom of these statutes lies the commendable desire of the tonsorial artist to get a little rest on the seventh day of the week, in common with his more fortunate fellow-men. He wants to escape from his overheated and underventilated shop, laden with microbes from the sewers with which the adjoining bath-rooms connect, and poisoned with the perfumes, tonics and cosmetics which he inflicts upon his customers, and to enjoy for one day in the week, nature's bright overarching blue and pure ozone. Whether he exercises his ancient and honorable craft in Greater New York, in St. Louis, or in San Francisco, he wants to be able to say, as his professional brethren in the World's Metropolis may have said: —

“The seventh day this, the jubilee of man.  
London! Right well thou knowest the day of prayer:  
Then thy spruce citizen, washed artisan  
And smug apprentice gulp their weekly air:  
Thy coach of Hackney, whiskey one-horse chair,  
And humblest gig through sundry suburbs whirl,  
To Hampstead, Brentford, Harrow make repair;  
Till the tired jade the wheel forgets to hurl,  
Provoking envious jibe from each pedestrian churl.”

At the bottom of all these attempted police regulations rests the obvious economic principle that, in the absence of such a regulation, enforced by penal sanctions, if one barber shuts up his shop, and goes out into the suburbs to “gulp his weekly air,” his rival will keep his shop open and get the customers of the former away from him. Therefore, it is necessary to have a statute applicable to all barbers, which will compel them to go out of their shops on Sunday, or go into the jail on some week day for it. But our State constitutions contain provisions that the legislature shall not pass local or special laws except in certain enumerated cases; and the case of the overworked, pale and anaemic barber is not, alas, excepted out of the provision. Wherefore the grave question has arisen whether the legislature can pass a law of the kind indicated, making it applicable to the tonsorial profession alone. The legislature of California lately passed such a statute. It was moderate in its demands; it merely prohibited barbers from keeping open their places of business or working at their trade on Sundays

after 12 o'clock noon. Nevertheless one barber, more enterprising than his fellows, refused to obey it, and got arrested, and brought his case before the Supreme Court of California.<sup>1</sup> And the court, in a more or less learned opinion by Mr. Justice Henshaw, concluded that, as this was not a general law to promote the interests of labor, as it did not relieve the poor devils who have to drive street cars and run express trains and the like, or even the tired and overworked judges who have to write their opinions on Sunday, it was a special law within the constitutional prohibition. The court accordingly discharged the prisoner.

The legislature of Missouri went further, and passed a law making it a misdemeanor for any person to carry on the business of a barber on Sunday. In defiance of this law William Granneman carried on his business, was convicted of a misdemeanor in the St. Louis Court of Criminal Correction, and appealed to the Supreme Court.<sup>2</sup> The court, in a brief but pointed opinion by Mr. Justice Burgess, reasoned that if the act were valid, then the legislature might by one act prohibit the farmer from laboring on Sunday, by another the blacksmith, and so on, until all kinds of labor would be prohibited on that day. "Clearly," said he, "this may be done by a general law embracing all kinds of labor." But he held that it could not be done by a special law applicable to a particular kind of labor. The act was therefore unconstitutional; the judgment of conviction was therefore reversed, and all the Missouri barbers began once more to work seven days in the week.

The statute of New York<sup>3</sup> was, like the California statute, more moderate. It afforded some relief to those citizens who desired to surprise their systems with a weekly bath and a semi-weekly shave on Sunday morning. It prohibited the carrying on of the business of a barber in the city of New York on Sunday after 1 o'clock in the day. It was not assailed upon the ground that it was a special law within the meaning of any constitutional prohibition, for it seems that there was no such prohibition; but on the loftier ground that it violated that provision of the constitution of the State which says that "no person shall be deprived of life, liberty or property without due process of law." It was claimed by the recalcitrant barber who had worked after 1 o'clock on Sunday, that it deprived him of "liberty" by preventing him from carrying on a lawful calling, and also of "property," by

<sup>1</sup> *Ex parte Jenztseh*, 44 Pac. Rep. 808

<sup>2</sup> *State v. Granneman*, 38 S.W. Rep. 784.

<sup>3</sup> N. Y. Acts, 1895, chap. 823.

depriving him of the free use of his premises, tools, etc., thus rendering them less productive. But the Court of Appeals of New York found itself unable to rise to that exalted plane of constitutional interpretation. In a clear and satisfactory opinion written by Judge Vann,<sup>1</sup> the court reached the conclusion that the act was not unconstitutional, and accordingly affirmed the judgment of conviction.

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**CONSTITUTIONAL LAW: VALIDITY OF CONTRACTS MAKING THE ACCEPTANCE OF BENEFITS FROM A RAILWAY RELIEF FUND BY EMPLOYÉS A WAIVER OF CLAIMS FOR PERSONAL INJURIES — CONSTITUTIONALITY OF A STATUTE ANNULING SUCH CONTRACTS.**— We hope that the decision of Mr. District Judge Ricks, rendered in the United States Circuit Court for the Northern District of Ohio in *Shaver v. Pennsylvania Co.*,<sup>2</sup> will be reviewed in a higher tribunal. The learned judge upholds in very strong terms — but not too strong for him, considering some of his previous holdings in controversies between railroad companies and their employés,— that a contract making the acceptance of benefits by a railroad employé from a railroad relief fund a waiver of claims for personal injuries, is valid; and further that it is not competent for the legislature, by a statute, to enact, as the legislature of Ohio did,<sup>3</sup> that such contracts shall not be valid. The Ohio statute is as follows: —

And no railroad company, insurance company, or association of other persons shall demand, expect, require or enter into any contract, agreement or stipulation with any other person about to enter, or in the employment of any railroad company, whereby such person stipulates or agrees to surrender, or waive any right to damages against any railroad company thereafter arising from personal injury or death, or whereby he agrees to surrender or waive, in case he asserts the same, any other right whatsoever, and all such stipulations or agreements shall be void.

Judge Ricks holds, as we understand his opinion, that this statute is unconstitutional, on the ground that it violates what is called “freedom of contract,” and on the further ground that it violates the provision of the constitution of Ohio against special or class legislation. There is an increasing number of decisions which run in the same current with this, but the people will find means to overturn them, and if necessary to turn out the judges who render them.

<sup>1</sup> *People v. Havenor*, 43 N. E. Rep. 541.

<sup>2</sup> 87 Ohio Laws, p. 149.

<sup>3</sup> 71 Fed. Rep. 981.

CONSTITUTIONAL LAW: INTERSTATE COMMERCE—STATE TAXATION OF INTERSTATE EXPRESS COMPANIES.—In the case of *Sanford v. Poe*, and other cases heard and decided with it on the 1st of February last,<sup>1</sup> the Supreme Court of the United States was very much divided on a subject which has previously troubled that court very much, the subject of the State taxation of the instrumentalities of interstate commerce. The court had under consideration the validity of a statute of Ohio, known from the name of its author as “the Nichols Law.”<sup>2</sup> We understand the general scope of the decision to be to uphold a State statute by which express, telegraphic and telephone companies become subject to taxation in three forms: on their real estate, on their gross receipts derived from business done within the State, and on their property situated within the State as valued by a local State taxing board. The last named assessment was resisted by the express companies on the ground that the laying of it by the State of Ohio contravened the commerce clause of the Federal constitution, because the assessments, while purporting to be upon their property situated within the State, were in fact levied on their business, which largely consisted of interstate commerce. The court was divided upon the question, five of the judges sustaining the law and four dissenting. The opinion of the court was written by Mr. Chief Justice Fuller, and the dissenting opinion by Mr. Justice White.

The peculiar feature of the scheme of taxation which the express companies challenged and which the court by a bare majority upheld, was something like this: The aggregate capital stock, according to the market value of the shares of the company, was the standard or gauge by which its actual property was measured. The company was obliged to make returns of the value of all its property in the State of Ohio and also of the value of all its property in all other States. Then a proportion was struck, something like this: As the aggregate value of the property of the corporation in all States is to the aggregate value of its property within the State of Ohio, so is its aggregate share capital to the sum upon which the State of Ohio lays its tax. For example, if the company returned \$1,000,000 as the value of its aggregate property wherever situated, and if one-tenth of that property was situated within the State of Ohio, and if at the same time it had a share capital of \$2,000,000 divided into shares of \$100 each, and if at the same time its shares were worth \$150 each, then the aggregate value of its property for the purposes of taxation in the State of Ohio, would be taken to be,

<sup>1</sup> 17 Sup. Ct. Rep. 305.

<sup>2</sup> Rev. Stat. Ohio, § 2777, *et seq.*

not \$1,000,000, but \$3,000,000, and one-tenth of this sum would be taken to be the amount upon which the State of Ohio might lay its taxes.<sup>1</sup> Whether this was a taxation of property and whether this scheme of taxation was merely a mode of ascertaining the value of the property and franchises of the company within the State of Ohio for the purposes of taxation by it, or whether it was a taxation upon interstate commerce, was the question upon which the court disagreed. In dealing with this question, Mr. Chief Justice Fuller, who wrote the opinion of the court, in referring to the aggregate property and franchises of the corporation, used the expression "unit of use," while Mr. Circuit Judge Lurton, who wrote the opinion of the Federal Circuit Court of Appeals which the Supreme Court now affirms,<sup>2</sup> endeavored to reach the same meaning by using the word "plant-unit." Among other expressions in the opinion of the court are the following:—

There is here no attempt to tax property having a situs outside of the State, but only to place a just value on that within. Presumptively all the property of the corporation or company is held and used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used. \* \* \* The States through which the companies operate ought not be compelled to content themselves with a valuation of separate pieces of property, disconnected from the plant as an entirety to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute.

<sup>1</sup> The following is the language of the statute describing this mode of assessment: "The said board shall proceed to ascertain and assess the value of the property of said express, telegraph, and telephone companies in Ohio, and in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the

entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

<sup>2</sup> 37 U. S. App. 378, 399; 16 C. C. A. 305; 69 Fed. Rep. 546; 16 C. C. A. 683; 69 Fed. Rep. 557. Mr. Circuit Judge Taft had previously held that the statute contravened the constitution of Ohio (61 Fed. Rep. 449; *Id.* 470), but the Supreme Court of Ohio having soon afterwards held the contrary, he recalled his opinion and followed the court whose decision interpreting the constitution of the State was authoritative (64 Fed. Rep. 9). The decision of the Supreme Court of Ohio is *State v. Jones*, 51 Oh. St. 492; *s. c.* 37 N. E. Rep. 945.

The decision of the majority of the court does not seem to transcend the principle which the court laid down in the leading case of *Western Union Telegraph Company v. Attorney-General*,<sup>1</sup> a decision which has been followed and supported by other cases. The dissenting opinion of Mr. Justice White, which is supported by the concurrence of three of the ablest judges of the court, Field, Harlan and Brown, proceeds upon the idea that this form of taxation is an indirect mode of taxation of interstate commerce, a power which is denied to the States by that clause of the Federal constitution which vests in Congress the power to regulate interstate commerce, which power is necessarily exclusive. Both opinions seem to be well thought out and to involve a thorough consideration of the previous decisions of the court bearing upon the subject. The question is obviously one of great difficulty. Questions of this kind have frequently divided the court. In the face of the present division of the court, whose opinion is rendered in no less than eleven cases after argument by very able lawyers, an opinion on the part of a reviewer would be justly regarded as presumptuous; though it must be said that the success of these interstate commerce agencies in levying tolls upon the people and at the same time in evading their obligation of contributing their share toward the expenses of the State governments which protect their property, creates a feeling of satisfaction that the result of this case is what it is. It ought to be added that the principle of the *Nichols* law can be applied to the taxing of railroad companies and all other instruments of interstate commerce.

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**CONSTITUTIONAL LAW: DUE PROCESS OF LAW — TAKING PROPERTY FOR PRIVATE USE — COMPELLING RAILWAY COMPANY TO ALLOW PRIVATE PARTIES TO BUILD A PERMANENT GRAIN ELEVATOR UPON ITS RIGHT OF WAY.**— The decision of the Supreme Court of the United States, in the case of *Missouri &c. R. Co. v. Nebraska*,<sup>2</sup> appears to have been rendered with unusual deliberation; for the case was first argued on December 3d and 4th, 1894, was ordered for reargument on December 17th, 1894, and was reargued on March 4th, 1896, and the decision of the court was not rendered until the 30th day of November, 1896. The opinion has been commented upon in the public prints, favorably in the more careful and conservative news-

<sup>1</sup> 125 U. S. 530.

<sup>2</sup> 17 Sup. Ct. Rep. 180.



papers, but unfavorably in some portions of the press in the extreme West. Unless it is carefully examined, it is liable to be misunderstood; and certainly the judgment of such a tribunal, rendered after such deliberation, ought not to be hastily criticised, especially when it is unanimous. Roughly stated, some farmers living near Elmwood Station in Nebraska, constituting a branch of what is called the Farmers' Alliance, which does not appear to have been incorporated, procured an order from the Nebraska State Board of Transportation to the Missouri Pacific Railway Company, directing it to grant them the privilege of erecting a permanent elevator upon the company's right of way, not for the purpose of serving the public generally, but to be used in storing and marketing their own grain. They procured this order upon the representation that the railway company had allowed two private owners to erect elevators on its right of way; that these elevators were insufficient to serve the public, and that the owners thereof were discriminating unjustly against the public and the petitioners in their charges. The railway company refused to comply with this order; and thereupon, under the statute, a mandamus was procured from the Supreme Court of Nebraska compelling it to do so.<sup>1</sup> Now if this had been a proceeding under any statute of Nebraska to condemn a portion of the company's right of way for the purpose of erecting a *public* grain elevator thereon, to be used for the general service and convenience of the public, upon payment of just compensation for the land so taken, it is quite clear — and it is so stated in the opinion of the Supreme Court of the United States — that a different question would have been presented. It may be doubted whether a court which has so often sustained, though always by a divided court, the power of the legislatures of the States to regulate the charges of the proprietors of grain elevators, even when owned by individuals and not by corporations,<sup>2</sup> and which declared the Chicago elevators to be situated at the very gates of interstate commerce, — would not have upheld such a proceeding. The proceeding in question, however, was, as the court justly characterized it, nothing more than a proceeding by a collection of farmers to obtain the privilege of erecting a grain warehouse upon the land of a railroad company, without paying anything therefor, in order to store their own grain there and ship it to market over the railroad. It seems, therefore, to have been nakedly an appropriation of the land of

<sup>1</sup> The case is reported in 29 Neb. 550.

<sup>2</sup> *Budd v. New York*, 148 N. Y. 517;

and see the mass of cases cited in the abstract of the opinion given further

on.

one owner to the private purposes of others, without any compensation, and to have deserved to be characterized, as the court did characterize it, as a taking of property without due process of law, within the prohibition of the Fourteenth Amendment. The opinion of the court is written by Mr. Justice Gray. It is learned and thorough like all the work of that distinguished judge and clearly vindicates the conclusion of the court.

The railway company was represented by Hon. John F. Dillon, of New York, both on argument and re-argument, and the Farmers' Alliance by Mr. George H. Hastings on the first argument, and by Mr. A. S. Churchill on the re-argument.

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**CONSTITUTIONAL LAW: THIRTEENTH AMENDMENT — WHAT CONSTITUTES INVOLUNTARY SERVITUDE UNDER THE THIRTEENTH AMENDMENT.**—The decision of the Supreme Court of the United States, in the case of *Robertson v. Baldwin*, rendered on January 25, 1897, is a clear and able exposition of the meaning and scope of the expression "involuntary servitude" contained in the Thirteenth Amendment to the Federal constitution, particularly with reference to the contracts of seamen. Briefly stated, the facts were these: The appellants were seamen who shipped on board the *Arago* at San Francisco for a voyage to some port in the State of Washington, thence to Valparaiso and such other ports as the master might direct, etc. Becoming dissatisfied with their employment, they left the vessel at Astoria, Oregon, and were subsequently arrested under the provisions of sections 4596 to 4599 of the Revised Statutes, taken before a justice of the peace, and, by him, committed to jail until the *Arago* was ready for sea (some sixteen days), when they were taken from the jail by the marshal and placed on board the vessel against their will. They refused to "turn to" in obedience to the orders of the master, were arrested in San Francisco, charged with refusing to work in violation of section 4596 of the Revised Statutes; were subsequently examined before a commissioner of the Circuit Court, and by him held to answer such charge before the District Court for the Northern District of California. Shortly afterwards they sued out a writ of *habeas corpus*, which, upon a hearing before the District Court referred to, presided over by Hon. Wm. W. Morrow, was dismissed, upon the ground, generally stated, that there was nothing savoring of "involuntary servitude" contrary to the Thirteenth Amendment, so far as their contract was concerned. They

were then remanded to the custody of the United States Marshal, whereupon they appealed to the Supreme Court of the United States. That court has now affirmed Judge Morrow's decision. The opinion in the Supreme Court is written by Mr. Justice Brown. He considers, in his usual perspicuous and vigorous style, two questions: "First, as to the constitutionality of sections 4598 and 4599 of the Revised Statutes in so far as they confer jurisdiction upon justices of the peace of the States to apprehend deserting seamen and return them to their vessel; second, as to the conflict of the same sections, and also section 4596, with the Thirteenth Amendment to the constitution, abolishing slavery and involuntary servitude." The first question is answered in the affirmative; in other words, Congress has the power to confer upon justices of the peace of the States the authority to apprehend deserting seamen, and return them to their vessel. The second question is disposed of as follows:—

The question whether sections 4598 and 4599 conflict with the Thirteenth Amendment, forbidding slavery and involuntary servitude, depends upon the construction to be given to the term "involuntary servitude." Does the epithet "involuntary" attach to the word "servitude" continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract; not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus, if one should agree for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17th, 1828,<sup>1</sup> it was enacted that if any servant in husbandry, or any artificer, calico printer, hands craftsman, miner, collier, keelman, pitman, glassman, potter, laborer or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. The breach of a contract for

<sup>1</sup> 4 Geo. IV, ch. 34, sec. 3.

personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others, nor would public opinion tolerate a statute to that effect.

But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the Thirteenth Amendment, it is not, within its spirit, a case of involuntary servitude. The law is perfectly well settled that the first ten amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press<sup>1</sup> does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms<sup>2</sup> is not infringed by laws prohibiting the carrying concealed weapons; the provision that no person shall be twice put in jeopardy<sup>3</sup> does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion;<sup>4</sup> nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify if a prosecution against him be barred by the lapse of time, a pardon or by statutory enactment.<sup>5</sup> Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.

The prohibition of slavery, in the Thirteenth Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union, since the foundation of the government, while the addition of the words "involuntary servitude" were said in the Slaughterhouse Cases,<sup>6</sup> to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and private service. To say that persons engaged in a public service are not within the amendment is to admit there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which

<sup>1</sup> Art. 1.

<sup>2</sup> Art. 2.

<sup>3</sup> Art. 5.

<sup>4</sup> *United States v. Ball*, 163 U. S. 662, 672.

<sup>5</sup> *Brown v. Walker*, 161 U. S. 591, and cases cited.

<sup>6</sup> 16 Wall. 36.

have from time immemorial been treated as exceptional shall not be regarded as within its purview.

From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained — as Molloy forcibly expresses it, “to rot in her neglected brine.” Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some case, the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provisions for securing the personal attendance of the crew on board, and, for their criminal punishment for desertion, or absence without leave during the life of the shipping articles.

After referring to the laws, ancient and modern, of other countries, to support his position, the learned justice adverts to the legislation of this country upon the subject, and shows that it comports with the enactments of other maritime countries in this respect, and that there is nothing inimical to the contract of seamanship, or to public policy, in such law. He concludes:—

In the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than sixty years before the Thirteenth Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts.

Mr. Justice Harlan dissented in an elaborate and dignified opinion, contending that the contract of a sailor and his liberty were within the spirit as well as within the letter of the Thirteenth Amendment.

Looking at the question from a practical standpoint and in the light of the great commercial and maritime interests of this country, we accept the prevailing opinion as enunciating the sound doctrine. We think that the view taken by the very learned justice in his dissent, that the liberty of the sailor is sacrificed and he is subjected to involuntary servitude if compelled to remain with his vessel during the term of his contract, is correct in theory, but dangerous and impossible in practice. The “servitude” is “involuntary” only when it becomes distasteful or unbearable to the sailor. If the latter, the laws provide certain remedies and penalties to be visited upon the master and officers. Perhaps, the best reply that can be made to the dissenting opinion is that

the contract of the sailor is one *sui generis*, and that, in this respect, the imperative demands and necessities of navigation and commerce require that the broad language of the Thirteenth Amendment be restricted so far as sailors are concerned. Such an interpretation is no more inconsistent with the sailor's constitutional rights than is the authority conferred upon the master to put him in irons for disobedience on board ship, or otherwise to punish him, when the extreme necessities of the situation demand it. It might well be objected that the sailor, by being put in irons, was being punished without due process of law. Certainly, such a course would never be tolerated on the soil of this liberty-loving country. A writ of *habeas corpus*, or perhaps some very summary punishment, would compel swift delivery of an employé confined by his employer for disobedience, however reprehensible such disobedience might have been. However, if the sailor, in the eyes of the jealous champions of our great constitutional rights, be deemed to be at a disadvantage in this respect, in others he has certainly advantages which are fully covered by being considered in Courts of Admiralty as "wards of the Court." It is a well known fact that Courts of Admiralty are, and have always been, jealous of the rights and privileges of seamen. Laws have been most liberally construed in their favor, provoking, from certain quarters, considerable adverse criticism. Whatever course these courts have pursued, which, at first blush, may have appeared detrimental to the interests of the sailor, was rendered necessary to foster and support the imperative necessities of a great maritime and commercial people. It must be remembered that Courts of Admiralty owe a duty not only to the sailor, but, also, to the paramount interests of navigation and commerce.

The dissenting opinion of Mr. Justice Harlan illustrates the strong love of liberty and of personal right which characterizes so many of the opinions of that distinguished judge. But it seems to carry the right of personal liberty beyond admissible limits. Beyond all question, there are circumstances and conditions in which a man may surrender his personal liberty for a time without the right to recall it, as where he enlists in the army or in the navy of his country, subjecting himself to military or to naval discipline as the same is established by statute and administered by martial law. The necessity for the application of the same principle to a merchant marine service is almost equally obvious. A rule of law which would establish in a sailor such a right of personal liberty and individual action as would enable him to put an end to his contract of shipment or enlistment whenever he might see fit to do so,

in the exercise of his own judgment or caprice, in whatever port and under whatever circumstances, would dissolve the merchant marine of any country and would produce that state of things described in one line of Byron's gloomy poem on *Darkness* :—

“ Ships sailorless lay rotting on the sea.”

This is not at all inconsistent with the doctrine that a person may escape from a merely private employment at his own will, subject to no other liability than an action for damages for a breach of his contract. But the business of carrying passengers and goods at sea is not a private business, and the employment of a sailor in such a business is not a private employment. It is an employment affected with a public interest and involving public rights. The proposition that a sailor can quit his employment at will and can not be coerced to remain therein, would involve the most disastrous consequences to innocent members of the public who may have taken passage or shipped their goods upon a particular ship. The constitution and laws of every country follow its flag, at least upon the high seas, and the deck of every ship is regarded as a part of the soil of the country whose flag it flies. Undoubtedly the constitution of the United States protects the rights of an American seaman on the deck of any American ship in whatever part of the world it may be. If that constitution allows him to desert it at pleasure, it allows him to desert and refuse to perform his duty in time of a storm, of a fire on board ship, or of any emergency of whatever character. The untenability of the doctrine is seen by a consideration of the results to which it would lead. A man ought not to be allowed to desert his employment, when to do so would be tantamount to the commission of murder, or to the wanton destruction of the property of third persons. Some of the circumstances which have attended recent railway strikes in this country lead to the serious question whether the principle which obliges a sailor to fulfill his obligation ought not to be extended by Congress to interstate railways; whether the interstate commerce law ought not to be so amended as to provide for an enlistment for a distinct period of time, during which the railway employé shall not be permitted to desert the service without a just excuse, the same to be prescribed by law or ascertained by a magistrate. Point is given to this view by a circumstance which occurred during the railway strike of 1894. Because certain laborers got into a disagreement at Chicago with a man named Pullman, all the train men of a railway passenger train on the Southern Pacific Railway in the Mohave Desert deserted the

train and left the passengers for several days to suffer in a burning heat without food and without water. Such infamous conduct deserves the application of criminal statutes, and the statute law ought to afford, if possible, coercive remedies to prevent it.

**CORPORATIONS: DISSOLUTION — LAND CONVEYED TO, DOES NOT REVERT UPON DISSOLUTION.**— In *Wilson v. Leary*,<sup>1</sup> the Supreme Court of North Carolina were again called upon to lay the ghost of the ancient doctrine that land conveyed to a corporation reverts to the grantor upon the dissolution of the corporation,—overruling a previous decision of the same court, written by Judge Gaston, a very eminent judge.<sup>2</sup> In the opinion of the court, which is written by Mr. Justice Clark, the following language occurs:—

It was true, it was held in an opinion by Gaston, J., in *Fox v. Horah*,<sup>3</sup> that by the common law, upon the dissolution of a corporation by the expiration of its charter or otherwise, its real property reverted to the grantor, its personal property escheated to the State, and its choses in action became extinct; and hence that, on the expiration of the charter of a bank, a court of equity would enjoin the collection of notes made payable to the bank or its cashier, the debtors being absolved by the dissolution. Judge Thompson<sup>4</sup> refers to this decision “in accordance with the barbarous rule of the common law” as “probably the last case of its kind,” and notes that it has since been, in effect, overruled in *Von Glahn v. De Rosset*,<sup>5</sup> and it is now expressly overruled by us. Chancellor Kent<sup>6</sup> says, “This rule of the common law has, in fact, become obsolete and odious,” and elsewhere he stoutly denied that it had ever been the rule of the common law, except as to a restricted class of corporations.<sup>7</sup>

But, whatever the extent of this rule at common law, if it was the rule at all, it was not founded upon justice and reason, nor could it be approved by experience, and has been repudiated by modern courts. The modern doctrine is, as held by us, that “upon a dissolution, the title to real property does not

<sup>1</sup> 26 S. E. Rep. 630.

<sup>2</sup> *Fox v. Horah*, 1 Ired. (Eq.) (36 N. C.) 358.

<sup>3</sup> 36 N. C. 358.

<sup>4</sup> 5 Thomp. Corp., § 6730.

<sup>5</sup> 81 N. C. 467.

<sup>6</sup> 2 Kent Comm. 307, note.

<sup>7</sup> 5 Thomp. Corp., § 6730. The subject is thoroughly discussed by Gray on Perpetuities, §§ 44–51, and he dem-

onstrates that my Lord Coke's doctrine rested on the dictum of a fifteenth century judge (Mr. Justice Choke, in the Prior of Spalding's Case [1467], 7 Edw. IV., 10–12), and is contrary to the only case deciding the point (*Johnson v. Norway* [1622], Winch, 37), though Coke's statement has often been referred to as law.



revert to the original grantors or their heirs, and the personal property does not escheat to the State."<sup>1</sup> The crude conceptions of corporations naturally entertained in a feudal and semi-barbarous age, when they were few in number, and insignificant in value and functions, by even so able a man as Sir Edward Coke, and the fanciful reason given by him<sup>2</sup> for the reverter of their real estate, to wit, that a conveyance to them must necessarily be a qualified or base fee, have long since become outworn and discredited. That which is termed "the common law" is simply the "right reason of the thing" in matters as to which there is no statutory enactment. When it is misconceived, and wrongly declared, the erroneous ruling is equally subject to be overruled, whether it is an ancient or a recent decision.

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**CORPORATION: DISTRIBUTION OF SHARES — FRAUDULENT PROSPECTUS — RESCISSION OF CONTRACT TO TAKE SHARES ON THE GROUND OF FRAUDULENT OMISSIONS IN PROSPECTUS.** — This doctrine, which has been threshed over in so many cases, English and American,<sup>3</sup> came before the English Court of Appeal for a new application in the recent case of *McKeown v. Bannard Peveril Gear Co.*<sup>4</sup> The well-known rule is that where directors put forth such a prospectus, concealing material matters, unfavorable to the enterprise, which in good conscience they ought to disclose, such a *suppressio veri* is tantamount to a *suggestio falsi*. But the English Court of Appeal, in a case where the leading opinion is written by that master of English Company Law, the Lord Justice Lindley, affirming the decision of Romer, J., hold that where there has been no positive misrepresentation in a prospectus issued by the directors of a company, a person to whom shares have been allotted, for which he had applied on the faith of statements contained in the prospectus, is not entitled to have his contract to take the shares rescinded merely because the prospectus did not set out all the facts which were known to the directors. In such a case he is only entitled to have his contract rescinded where the facts not disclosed are such that the omission to disclose them renders the prospectus, as it stands, misleading.

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**AGENCY: LIABILITY OF UNDISCLOSED PRINCIPAL — LIABILITY OF TRUSTEES AS UNDISCLOSED PRINCIPAL OF RECEIVER APPOINTED BY THEM.** — In the case of *Gaskell v. Gosling*,<sup>5</sup> a company conveyed all their

<sup>1</sup> 5 Thomp. Corp., § 6746; *Owen v. Smith*, 31 Barb. 641; *Towar v. Hale*, 46 Barb. 361.

<sup>2</sup> Co. Litt. 136.

<sup>3</sup> 74 Law Times Rep. 310.

<sup>4</sup> 74 Law Times Rep. 713.

<sup>5</sup> 74 Law Times Rep. 674.

property and business to trustees for debenture-holders by a deed which gave them power, in certain events, to appoint a receiver of the mortgaged property, who should have power to carry on the business and should "be the agent of the company who alone should be liable for his acts and defaults." The trustees appointed a receiver by an instrument which provided that he should open an account at a bank as receiver, and should pay into that account, on the day of their receipt, all moneys received by him as receiver, and that all checks drawn by him on that account should be countersigned by the trustees' solicitor. An order to wind up the company was made and a liquidator appointed, but the liquidator in no way interfered with the business. The receiver continued to carry on the business, and ordered goods for the business, in the name of the company as receiver. The court held (affirming the judgment of Lord Russell, C. J., *dissentiente* Rigby, L. J.), that the trustees were liable for the price of the goods as the undisclosed principals of the receiver.

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**LIBEL: PRIVILEGED COMMUNICATION — PUBLICATION OF REMARKS MADE AT A MEETING OF A CITY COUNCIL.**— In *Buckstaff v. Hicks*,<sup>1</sup> the Supreme Court of Wisconsin hold that publication in a newspaper of remarks made, at a meeting of a city council, by the city's representative in the State Assembly, purporting to give information as to the conduct of the representative of the city in the State Senate with reference to passage of city charter amendments, is not privileged, though the newspaper be the official paper of the city, the article being a mere voluntary unofficial report, published as a matter of news; especially where the paper circulated outside the city and the senator's district. In order to understand the force of this ruling, it is necessary to recur to the well-known doctrine in the law of libel in respect of what is frequently called a privileged communication, but which ought to be called, as it is now sometimes called in the English books, a *privileged occasion*.<sup>2</sup> The law in regard to the privileged occasion is, roughly stated, that where the matter is a matter of public interest, the law does not presume malice from the fact that the matter published is false, but that the burden lies upon the plaintiff to prove express malice. This rule, which has a very important relation to the liberty of the press, has

<sup>1</sup> 68 N. W. Rep. 408.

by Frank E. Hodgins, Esq., in the

<sup>2</sup> See a clear article on this subject *Canadian Law Times* for March, 1896.

been clearly brought out in recent English cases, though in the American books the subject is attended with more or less confusion. The holding of the Wisconsin court is believed to be unsound. Upon the clearest grounds, a debate in a city council on a matter relating to the interests of the city presents a privileged occasion, such as exonerates the publisher of a newspaper who prints that debate from liability to an action for damages for a libel, in case some statement therein made may turn out to be untrue, unless the jury affirmatively find that, in making the publication, he was actuated by express malice as against the plaintiff. It is true that, when it comes to the manner of proving express malice it may be proved, like any other fact or human motive, by circumstances; and the circumstances attending the publication may be such as, of themselves, to furnish evidence of such malice. Untruthful statements uttered in debate may be so glaringly untruthful or unjust to the person against whom they are levelled, as of themselves to afford evidence of express malice in publishing them; and that is possibly what the Wisconsin court mean.

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**FEDERAL JURISDICTION: DIVERSE CITIZENSHIP—TRUSTEE IN A MORTGAGE DEED OF TRUST.**—In the case of *Shipp v. Williams*,<sup>1</sup> the Circuit Court of Appeals for the Fifth Federal Circuit decided that Federal courts have no jurisdiction of a bill by the beneficiary under a mortgage deed of trust against the mortgagor and the trustee to foreclose the mortgage, although the trustee refuses to act, where the trustee and the mortgagor are citizens of the same State; since the trustee, although a defendant, is really on the same side of the case as the beneficiary. This decision is an application of the well-known rule of Federal jurisdiction that jurisdiction as depending upon diverse citizenship depends upon the citizenship of the real, and not the formal parties; and that, for the purpose of determining who are the adversary parties, the court will array them according to their real interests, and not according to the positions which they occupy upon the record. Although this decision was rendered as early as May 8th, 1894, and can therefore hardly be called "a recent decision," yet it is hoped that it is not too late to correct the error into which the court fell in overlooking a prior decision of the Supreme Court of the United States,

<sup>1</sup> 62 Fed. Rep. 4; s. c. 10 C. C. A. 247.

which holds precisely the contrary on the same state of facts.<sup>1</sup> Mr. H. Campbell Black, a distinguished law writer and annotator, has enriched the case of *Shipp v. Williams* as published in the C. C. A.,<sup>2</sup> with a long and learned note on Federal jurisdiction as depending on citizenship; but in discussing this question he, in like manner, overlooks the decision of the Supreme Court in *Hotel Co. v. Wade*. The doctrine of subsequent cases in the Supreme Court does not over turn the doctrine of *Hotel Co. v. Wade*, nor even do the subsequent cases cite that case;<sup>3</sup> though, if the direct authority of that case were out of the way, they would have a bearing which might lead to the contrary conclusion. But the decision in *Hotel Co. v. Wade* is manifestly sound, when it is considered that, by refusing to execute his trust, the trustee in a mortgage deed of trust takes a position antagonistic to that of the beneficiaries under the deed, and that, when they are driven, by his taking such position, or where they exercise their right to have the foreclosure take place in court instead of *in pais*, it may be necessary to enjoin him from attempting the sale under the deed of trust, or from interfering with the possession of any receiver who may be appointed *pendente lite*,—it becomes obvious that he is essentially an adversary party in the proceeding, and not a concurring party; and the fact of his being an adversary party against whom substantial relief is sought, gives jurisdiction to the Federal tribunal.

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**CORPORATIONS: "ONE-MAN COMPANIES"—POWER OF A SOLE TRADER TO INCORPORATE HIMSELF AND TRANSFER HIS STOCK IN TRADE TO THE CORPORATION AT AN OVERVALUATION AND ESCAPE LIABILITY TO HIS CREDITORS.**—In the case of *Salomon v. Salomon*<sup>4</sup> decided in the House of Lords in November last, that great tribunal, six of its members concurring and none dissenting, held, in substance, that, under the English Companies Acts, it is possible for a sole trader to turn himself into a limited liability company, by means of issuing one share each to a sufficient number of dummies, and for him to turn his individual stock in trade over to the company in payment for its shares and for an additional mass of its debentures issued to him; and that, if the company soon thereafter becomes involved in debt and fails and goes into

<sup>1</sup> *Hotel Co. v. Wade*, 97 U. S. 13.

717; *Peper v. Fordyce*, 119 U. S. 469;

<sup>2</sup> 10 C. C. A. 247, 249.

*Dodge v. Tulleys*, 144 U. S. 451.

<sup>3</sup> *Thayer v. Association*, 112 U. S.

<sup>4</sup> 75 L. T. Rep. 426.

liquidation, its unsecured creditors have no remedy against him. That is a round statement of what this very important case holds, made by us after a very careful reading of five opinions delivered by five of the Lords.<sup>1</sup> It is hoped that the doctrine of this case will not be accepted in the United States without very serious consideration. It should not be forgotten, whenever it is tendered to an American court as authority, that, in so holding, the Lords found it necessary to overrule four learned judges in the courts below.<sup>2</sup> The opinions of both the courts below conceded the fact that an incorporated company had been validly formed under the statute; but Mr. Justice Williams, who heard the case in the first instance, took the somewhat attenuated ground that the company was merely the agent of the sole trader who had organized it, and that, as his agent, it was entitled to be indemnified by him against losses made by it in acting as his agent. This view seems to have been altogether too refined, and it is not surprising that the Lords were unable to accede to it. The Lord Justices of the Court of Appeal did not accede to it, but proceeded upon the somewhat analogous view that, although the company had been validly organized under the statute, at least so far as regarded matters of external form, yet the circumstances were such that it acted as trustee for the sole trader who had organized it. This view the Lords also put aside after close criticism, and it is impossible to say that they were not sound in so doing. But the Court of Appeal also held that what was done was a mere scheme to enable a sole trader to become a corporation by means of associating with himself certain dummies who had no substantial holdings of the shares of the company, but who were his mere nominees and creatures; and the substance of their judgment was that such a scheme was a fraud upon the statute, contrary to what the legislature intended, and that a court of equity ought to cut through it and hold that a trader could not, by such a manipulation, escape liability to his future and intended creditors. But the Lords found nothing in the language of the statute prohibiting companies from being formed in this way, and their opinions indicate that, as matter of common knowledge, that is commonly done in Great Britain. This develops, perhaps, the most important feature of the case, which lies in the doc-

<sup>1</sup> Lord Morris merely concurred without giving a separate opinion.

<sup>2</sup> The cases consisted of cross appeals from a judgment of the Court of Appeal (Lindley, Lopes and Kay, L.JJ.)

reported in 72 L. T. Rep. 755 (1895); 2 Ch. Div. 823, who had affirmed an order of Williams, J., reported in 72 L. T. Rep. 261.

trine that a single individual may validly transform himself into a corporation unless the governing statute in terms prohibits corporations from being thus formed, by the mere device of having a few shares issued, as was the case here, to his wife and children, or, as is frequently the case, to his clerks. As there was nothing in the statute prohibiting that, the Lords found themselves unable to interpolate into the statute such a prohibition, holding that to do so would be to usurp the functions of the legislature. Upon this question some of their observations are interesting. The Lord Chancellor (Halsbury) dealt with this phase of the case in the form of a succession of criticisms upon the observations of Mr. Justice Williams and the Lords Justices of the Court of Appeal, thus:—

I observe that the learned judge (Williams, J.) held that the business was Mr. Salomon's business and no one else's, and that he chose to employ as agent a limited company. And he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent — the company. I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon; if it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not. Lindley, L. J., on the other hand, affirms that there were seven members of the company, but, he says, it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the legislature intended not to be done. It is obvious to inquire where is that intention of the legislature manifested in the statute? Even if we were at liberty to insert words to manifest that intention, I should have great difficulty in ascertaining what the exact intention thus imputed to the legislature is or was. In this particular case it is the members of one family that represent all the shares; but if the supposed intention is not limited to so narrow a proposition as this, that the seven members must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as to bring it within the supposed prohibition? It is, of course, easy to say that it was contrary to the intention of the legislature — a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute. As one mode of testing the proposition it would be pertinent to ask whether two or three, or, indeed, all seven, may constitute the whole of the shareholders. Whether they must be all independent of each other in the sense of each having an independent beneficial interest — and this is a question that cannot be answered by the reply that it is a matter of degree. If the legislature intended to prohibit something, you

ought to know what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. Where am I to get from the statute itself a limitation of that provision that that shareholder must be an independent and beneficially interested person? I find all through the judgment of the Court of Appeal a repetition of the same proposition to which I have already adverted — that the business was the business of Aron Salomon, and that the company is variously described as a myth and a fiction. Lopes, L. J., says: "The Act contemplated the incorporation of seven independent *bond fide* members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader." The words "seven independent *bond fide* members with a mind and will of their own and not the puppets of an individual" are by construction to be read into the Act. Lopes, L. J., also said that the company was a mere *nominis umbra*. Kay, L. J., says: "The statutes were intended to allow seven or more persons *bond fide* associated for the purpose of trade to limit their liability under certain conditions and to become a corporation. But they were not intended to legalize a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint-stock company." The learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing, if it had a legal existence, and if, consequently, the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered. Williams, J., appears to me to have disposed of the argument that the company, which, for this purpose, he assumed to be a legal entity, was defrauded into the purchase of Aron Salomon's business, because, assuming that the price paid for the business was an exorbitant one, as to which I am myself not satisfied, but assuming that it was, the learned judge most cogently observes that when all the shareholders are perfectly cognizant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend that the company is being defrauded. The proposition laid down in *Erlanger v. The New Sombbrero Phosphate Company*<sup>1</sup> — I quote the head-note — is, that "Persons who purchase property, and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it." But if every member of the company, every shareholder, knows exactly what is the true state of the facts, which for this purpose must be assumed to be the case here, Williams, J.'s, conclusion seems to me to be inevitable — that no case of fraud upon the company could here be established. If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of. The truth is that the learned judges have never allowed in their own

<sup>1</sup> 39 L. T. Rep. 269; 3 App. Cas. 1218.

minds the proposition that the company has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be, in influence and authority, the whole company, and assuming that such a thing could not have been intended by the legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law, and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there.

In the course of his judgment Lord Herschell said:—

It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion it makes no difference. The statute forbids the entry in the register of any trust, and it certainly contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum or who have agreed to become members of the company, and whose names are on the register, are alone regarded as, and, in fact, are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share involves. Without they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do; it concerns only them and their *cestui que trust* if they have any.

Upon the same subject Lord Macnachten said:—

There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned Lords Justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed, the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters, without intending to take any further part or interest in the matter. When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith" to use the words of the enactments, "of exercising all the functions of an incorporated company." Those are strong words. The company attains maturity on its birth. There is no period of minority; no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not."



Further on he said:—

It has become the fashion to call companies of this class "one-man companies." That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading; if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up it cannot matter whether they are in the hands of one or many. If the shares are not fully paid it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.

As to the effect of contracting with himself by means of having himself incorporated, and standing at one end of the contract and having himself as an individual standing at the other end of it, and in this character transferring his individual property to himself in his corporate capacity at an overvaluation — and it seems to have been admitted by all the Lords that it was transferred at an overvaluation,— the Lords saw in this no evidence of fraud, nor anything blameworthy, but some of them seem to have regarded it as commendable!

This decision will commend itself to those American judges, unhappily too numerous and seemingly on the increase, who do their thinking on the side of corporations, and who, when questions of this kind come before them, allow their minds to forget the rights of the scattered and segregated people, to ignore questions of public policy, to forget that *the members* of an insolvent corporation are *the real debtors*, the debts having been contracted to carry out their schemes, for their benefit, and by their agents, and to allow their minds to glide easily and cheerfully into results favorable to the schemes of adventurers who manipulate corporations.

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**NEGLIGENCE: LIMITING LIABILITY FOR, WHERE CAUSE OF ACTION RECOGNIZED BY STATUTE.**—The Supreme Court of Minnesota was one of the first American courts to hold, on grounds of public policy, that a man cannot bargain away his life to a common carrier of passengers,— in other words, cannot bargain away the right of action on the part of those who may otherwise have it in case of his being killed through the

negligence of the carrier or his servants.<sup>1</sup> That doctrine has since taken root widely in the United States. That court now holds that, where a statute of the State creates a duty, having regard to the public safety, on the part of a railroad company, such as the duty of stopping within a prescribed distance before arriving at the crossing of another railroad, and provides a penalty for the neglect or violation of the duty,—it is not competent for the railroad company to bargain away its liability to a person for failure to perform this duty. When therefore a news agent was injured by a collision caused by the negligence of the railway company on whose train he was carried, in failing to comply with such a statute, it was held that a contract between the news agent and the railway company exempting the company from liability for injuries to the news agent caused by its negligence, was void, as against public policy,—and this although the defendant may not have borne toward the news agent the relation of common carrier. In the case of *Louisville &c. R. Co. v Keefer*,<sup>2</sup> the Supreme Court of Indiana denied the same doctrine without reference to the question whether the negligence consisted in a failure of a statutory duty. The court held that a railroad company cannot, by special contract with a passenger, exempt itself from liability for the results of its negligence while performing a duty it owes to the public, as a common carrier; that it is not the duty of a railroad company, as a common carrier, to carry the goods of an express company, and the messengers in charge of them, and that a railroad company which undertakes, as a matter of accommodation, or by special engagement, to carry an express messenger, whom it is not bound to carry, becomes a private carrier, or bailee for hire, as to the thing so carried, and may protect itself by contract from the result of its negligence in respect thereto.

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**TORTS: LIABILITY OF DRUGGIST TO HUSBAND FOR SELLING LAUDANUM TO WIFE.**—The increase of the number of causes of action which are recognized by the law may be taken, in a general way, as evidence of increasing civilization. Among barbarians the wrongs which the rude justice of that state recognizes and redresses are few in number. For instance, injuries arising from negligence find no remedy, unless perhaps in the case of accidental homicide, where it is the shedding of

<sup>1</sup> *Jacobus v. St. Paul &c. R. Co.*, 20 Minn. 125.

<sup>2</sup> 44 N. E. Rep. 796.

blood rather than the social injury which is punished. The statutory action for the death of a near relative is an illustration of the increasing sensitiveness of the law to violations of social obligation, as is the action for selling liquor to an inebriate. In a recent case<sup>1</sup> the Supreme Court of North Carolina has extended the principle of the latter action to the redress of an injury hitherto unrecognized by the law, that of selling laudanum to the plaintiff's wife, who was addicted to the drug.

<sup>1</sup> *Holleman v. Harvard* (N. C.), 25 S. E. Rep. 972.

## CORRESPONDENCE.

## THE PENITENTIARY FOR TICKET SCALPERS.

*To the Editors of the American Law Review:*

I learn from the *Albany Law Journal* that, "Hon. James S. Sherman has introduced a bill in the House [of Representatives of the United States] to prevent the sale of railway tickets by 'scalpers' and to punish forgeries of such tickets." The bill also provides for the punishment, by fine and imprisonment, of any one who sells the unused portion of any ticket, except to the company from which he bought it, and the railroad companies are to be compelled to redeem such unused portions on an equitable basis. Laws of this character have been enacted by State legislatures in the past, but in all such cases, I believe, the legislators who voted for them were generally known to be the private chattels of the railroad companies. When the late Thomas Scott, president of the Pennsylvania Railroad Company, took upon himself the duty of making the laws of that Commonwealth, a law of this character was enacted, and it is my recollection that several reputable and honest brokers were sent to the penitentiary for a term of years for its violation. The people of Pennsylvania finally wearied of a system under which the criminal laws of the State were administered as a part of the private business machinery of the Pennsylvania Railroad Company, and the law was repealed. I have no doubt that Mr. Sherman's bill will be overwhelmingly defeated should it be reintroduced and reach a vote; and for this reason it is to be regretted that it will in all probability never come to a vote. The House of Representatives can not put itself on the level of backwoods legislatures, from whose list of abortive measures a bill of this character is seldom lacking. They are introduced, as was the Pennsylvania bill, from a shameful motive, or in that spirit of mischievousness which wants to regulate everybody and everything,—a spirit most rampant in those persons least qualified to regulate anybody or anything. No plausible argument has ever been advanced, or can be advanced, for suppressing a business whose existence depends on its services to the travelling public, which deals in a legitimate commodity in a lawful way, and whose operations are beneficial to every class in the community except the great railroads, whose rapacity they curb to a slight extent.

THOMAS W. BROWN.

ST. LOUIS.

## BOOK REVIEWS.

**BEACH ON RECEIVERS, ALDERSON'S EDITION.**—A Practical Treatise on The Law of Receivers, with extended consideration of Receivers of Corporations. By CHARLES FISK BEACH, Jr., of the New York Bar, author of Treatises on "The Law of Contributory Negligence," "Modern Equity Jurisprudence," etc., etc. *Second Edition*, with elaborate additions to the text and notes and material changes therein, by WILLIAM A. ALDERSON, of the St. Louis Bar, author of a treatise on "Judicial Writs and Process." New York: Baker, Voorhis & Company. 1897. pp. 1016. Price, \$6.00 net or \$6.30 delivered.

This well-known work comes to us in an edition which greatly enlarges and changes the original work and greatly improves it. We turn to Mr. Alderson's preface to see what he has to say about his edition, for an author or an editor knows the plan and scope of his work better than any one else can know it. He says: "Since the publication of the work of Mr. Beach upon receivers, nine years ago, this modern subject has been considered, extended and built up in a vast amount of litigation, involving the rights and liabilities of corporations and individuals. The publishers gave to the writer the privilege of changing the text and notes and adding thereto in any particular desired. With this authority I have labored for many months to present to the profession a full and comprehensive treatise upon the law of receivers. I have not been satisfied to merely present the decisions of the various courts, but, upon questions as to which courts have disagreed, and concerning many propositions not yet adjudicated, I have indulged in discussion and the expression of my own views. An estimate of the matter added to the original edition may be had by considering that the pages of the present edition are larger and outnumber those of the first edition by one hundred and forty-four; while a large number of additional cases is cited and considered. Yet, the arrangement of the contents of the book is entirely systematic and harmonious. It has been the purpose to make the present edition entirely practicable, of value to the experienced and inexperienced practitioner. Special consideration has been given to matters of practice, and attention is particularly called to the final chapter, entirely new, for a statement of the general principles concerning the law of receivers, and the mode of procedure in receivership litigation."

The editor has well carried out his plan. We estimate that fully one-third of his edition is wholly new matter. The number of pages of the work has been increased by more than one hundred and forty, and the pages are at the same time much larger, the increase being both in the width and length of the page. Many sections wholly new have been added, and additions have been made to almost all the sections as they stood in the original work. The number of sections into which the work is divided is only a few more than in the first addition; and no attempt has been made to preserve the original section numbers, so that references from that edition cannot readily be found in the present. There are now twenty-six chapters where there were originally only twenty-three; and the chapter headings have been somewhat changed to

express the contents more accurately. The general plan of arrangement of the work remains, however, the same. The number of cases cited is now about forty-two hundred, whereas the number in the first edition was about twenty-six hundred. Naturally these new cases and the new text which embodies the new law from the most important part of the work; for many of the new cases announce new principles of law or new applications of old principles; and new cases, though they may not be so important as old cases in which new principles, or new applications of principles, were first announced, and though they merely confirm existing law, are the delight of practicing lawyers, for they show, at least, that the old law has not been changed or modified.

Two years ago Mr. Alderson published his elaborate work on *Judicial Writs and Process*, which we praised in the *REVIEW*; and now he has materially added to his reputation by his thorough work in preparing this new edition of *Beach on Receivers*. The new text which he has added constitutes an important part of the whole work. In this he has carefully stated and wrought out the law upon some topics which have lately assumed great practical importance. With so much that is excellent in substance, we regret to see some carelessness in proof-reading and perhaps in some minor matters of style.

**THE LAW OF RAILWAY ACCIDENTS IN MASSACHUSETTS.** — By G. HAY, JR., A. M., LL.B. Boston: Little, Brown & Company. 1897. pp. 353.

Although the title of this work indicates that it is founded upon Massachusetts decisions, it is not by any means a book of merely local interest or use. Massachusetts law is everywhere regarded as good law, and a lawyer in any State feels that he has good ground for any contention which he can rest upon a decision of the Supreme Court of that State.

Railway accidents, especially those happening from the operation of street railways, are the source of much litigation everywhere, and of numerous jury trials: and in all such cases such statement of the law as this book contains is of great value. About eight hundred cases are cited, all but a very few being decisions of the highest court of Massachusetts. We notice two or three citations from the courts of other American States, and several English cases.

There is a short introduction on The General Question of Negligence. The remainder of the book is divided into five parts containing together fifty-six chapters, as follows:—

Part I. The Right to Physical Integrity.

II. Conduct.

III. The Effect of Rights In Rem.

IV. The Effect of Rights In Personam, or Contract Rights. Three classes of cases are considered. 1. Invitee Cases. 2. Passenger Cases. 3. Master and Servant Cases.

Part V. The Rule known as *Respondet Superior*.

The book is not in the ordinary form of a treatise, with references to cases cited at the foot of the page; but the cases are in the body of the page following the statement of facts and principles derived from them. There are, however, numerous notes in smaller type at the end of the various chapters, commenting upon the cases. There is at the beginning of each chapter and at intervals in the longer chapters a somewhat extended statement of principles

with a few citations, followed by a part, headed *Cases*; in which the important facts of the cases are briefly stated.

The author evidently has a logical as well as discriminating faculty of mind. He states his propositions clearly and to the point. This book will be found to be of very great service to lawyers who are called upon to advise in questions arising out of railway accidents, and of greater service still to those who have such cases to try or argue before the courts.

**AMERICAN STATE REPORTS, VOL. 52.**—The American State Reports, Containing the Cases of General Value and Authority, Subsequent to those contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated by A. O. FREEMAN, and the Associate Editors of the "American Decisions." Vol. LII. San Francisco: Bancroft-Whitney Company. 1896.

This volume, which very much resembles its last two predecessors, contains, as usual, brief notes in the nature of cross-references at the end of each case, referring to notes in former volumes of the series upon the subjects of the particular case. It also contains monographic notes upon the following subjects: the Liability of the Estates of Decedents upon Contracts and for Torts of Executors and Administrators,<sup>1</sup> the Remedies of Purchasers at Judicial Sales,<sup>2</sup> a note evidently written by Mr. Freeman himself, which criticises, in some respects, the decision to which it is appended, which is that of the Supreme Court of California; Incumbrances by Pre-emptors and other Claimants of Public Lands;<sup>3</sup> Features of the Law Specially Applicable to Mutual or Membership Life or Accident Insurance;<sup>4</sup> Liability of One Cotenant to Another for Rents and Profits Received from and for Expenditures upon their Common Property.<sup>5</sup> The subject of this last note relates to cotenancy and partition, on which Mr. Freeman has written a very acceptable work. The attention of the learned editor having been in this manner drawn strongly to that subject, we possibly find in the series an unusual number of notes on questions relating thereto. We doubt whether the substitution by the publishers of thin-faced capital letters in place of the bold-faced type which they formerly used for their catch-words or head-lines, assists in facilitating search as well or even improves the typographical appearance of the volumes; but it is certain that they will not change their type because of our objections.

<sup>1</sup> Page 118, *et seq.*

<sup>2</sup> P. 176, *et seq.*

<sup>3</sup> P. 249, *et seq.*

<sup>4</sup> P. 543-579.

<sup>5</sup> P. 924-941.







**FREDERIC R. COUDERT.**

# THE AMERICAN LAW REVIEW.

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MAY-JUNE, 1897.

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## INTERNATIONAL ARBITRATION.<sup>1</sup>

We are gathered here to-day in honor of the founder of our nation, or as we prefer in filial reverence to call him,—the father of our country. His fame is his own, his eminence unique. Our jealous love for him will allow no other statue a place on the same pedestal; none other shall stand as a rival in his claim to our devotion. For his light shone in the dark days as the only star that meant hope, his steadfastness kept the tottering young nation from despair, his genius and serenity, his faith and his courage, inspired and strengthened those who were fighting the great fight. But for him and his inspiration who will venture to say that the freemen of to-day would not be the defeated rebels of the past; who will study the fearful pressure of ever increasing perils and dispute his claim to our gratitude so long as we remain one people? Overwhelming odds tested his genius, treason wrung his heart, jealousies and rivalries baffled his plans, but the serenity of his soul was undisturbed. As though a ray of divine inspiration had touched his spirit, he looked beyond the trials, perplexities and cares of each day and saw the vision which others were blind to enjoy. He could remain firm without the encouragement of victory, he could accept defeat without despondency, he

<sup>1</sup> An address by Hon. Frederic R. the 22d of February last (Washington's birthday). See "Notes."—Union League Club, of Chicago, on Eds. AM. LAW REV.



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made stepping-stones of disaster and amazed the world by his fortitude. Benedict Arnold might wound his heart, but even that cruel wound could not open the way to despair. His half-clad and half-fed troops might leave the track of bloody feet in the snows of New Jersey, but the radiant vision never melted from his sight. His powerful enemies might send veteran troops in huge bodies to crush the straggling rebels, but his faith never faltered. The day would surely come when the dreams would become reality, and after great tribulation and trial and suffering a new child would be born into the family of nations,— a child destined to become a giant, strong enough to fear no enemy but itself.

We have indeed many great names in our national gallery besides that of Washington. Many men, during the short history of a century, have carved their names in deep letters on the world's story. From the earliest day we have had statesmen who built wisely and well for the country's good: from Adams and Jefferson to the men now living and now striving to carry on the work of the fathers we have had leaders eminent in peace. But yet the universal voice still clamors with the swift instinct of discerning gratitude, "he was first in peace."

The records of our army blaze with glorious traditions. Scott of Lundy's Lane and Mexico, Grant of Vicksburg and the Wilderness, Hancock the Superb, Sherman, Sheridan, McClellan, Thomas, a very host of giants have won immortal fame on hard-fought fields, but yet the people still proclaim *him* "the first in war." Patriots pure and unselfish, orators eloquent and earnest, judges whose patient research and learning have helped to build our young Republic on a solid foundation of law, these have not worked in vain and will live in the memory of generations to come, but yet the pulse of the nation beats with accelerated life when he is mentioned, for he still stands "first in the hearts of his countrymen." No wonder then that sixty million people are willing that the restless activities of their daily lives should stop for a day in order that they may wrap themselves up in his memory as in a garment and still look to him for wise counsel. Those who have lived as Washington lived, yield but a part of themselves to the grave. The example, the inspiration, the

patriotic endurance and unselfishness, all these are beyond the reach of rust and decay. They teach their lesson even when the centuries have gone, and need no voice to perpetuate their benefactions.

What shall we do this day, to prove the sincerity of our professions? How best can we honor him? Truly the better way would be to look for something wherewith to serve our country, to bring some earnest thought to the great problems which it is our function to solve. To carry fragrant flowers to the tomb of the illustrious dead is indeed a graceful tribute of affection, to pronounce eulogies in their honor is decorous and just: but on each coming day that recalls the birth of Washington to consecrate ourselves anew to the service of our country is surely the noblest way to do him honor. For then we but follow the example of one who pledged life and fortune and sacred honor to the cause of the people, and we may confidently believe that were his cold lips allowed to move in admonition to the people who love him he would bid them intermit empty pageants and funereal ostentation that they might look to the future and the future's dawn, and seek to make it brighter. If those wise lips could move, do we not know from the teachings of his life that he would warn our people against anger and revenge, that he would teach them the horrors of war and the beauties of peace? Would we not be taught in solemn accents that a great nation may be patient without shame and may with honor forbear to strike? He was first in war and knew its horrors: he was first in peace and knew its beauty. Can we doubt that his blessing would have been, with the Divine benediction, on the peace-makers: can we doubt that the lovers of war would have been thrust aside as enemies of his people? He could tell us that in war the burden of the day and the heat are the people's lot and hard to bear: that the joyousness of peace is the people's opportunity and the laborer's inheritance. Where would he stand, think you, if the key of the Temple of Janus were in his hand, and if he could, by a turn of that key, shut off War's frowning face and silence War's harsh voice?

We may then on this day, so especially his own, raise our voice in favor of peace, the handmaid of art, the friend of

science, the mother of industry, and the promoter of all good; we may recall to our own minds the claims that she has to our duty, while the true nature of war, in dark and deadly contrast, shorn of its meretricious charm, stands out as the old-time and persistent enemy of the human race.

From the early day when the first man born of woman slew his brother, war has been the chief occupation of mankind. No condition of the human race has been so debased that the successful warrior has not been the chief among his fellows; no condition has been so exalted that the successful warrior has not stood above his brethren. He has always received the homage of his tribe, his clan, or his country, and been honored in direct proportion to the human lives that he has taken. The patient student whose midnight labors have enriched the world, the inspired artist whose works undying and never old, delight generations of men, the poet who imprisons in his verse the beauties of nature and gives a voice to the aspirations of the human race, all these may earn the admiration of mankind, but the military hero has always been the favored object of universal praise. Whether his name be Alexander or Cæsar, Hannibal or Napoleon, Frederic, or Charles, he is the easy winner in the competition for fame. Homer himself, the blind bard and master in all the ages, still lives because he was divinely skilled in telling how a Greek hero smote a Trojan warrior to death by hurling at his devoted head a stone which four men of more recent and degenerate times could scarcely lift. Virgil lives because his warrior showed his manhood by seizing another man's land, and killing the owner with cruel sword aggravated by eloquent speech. Milton himself might have knocked at the gate of the temple of fame in vain if he had not in sublime music, sung of the battle between the Spirits of Light and the Angels of Darkness. Ordinary avocations have always seemed tame and unprofitable when placed by the side of the gorgeously appareled and superbly mounted hero. He appeals to the imagination and draws the applause of men and women alike: for the women themselves with their boy baby in their arms rejoice with glittering eyes as they look upon the hero and his horse; they wonder in their gentle hearts whether their own chubby idol may not grow up

to kill so many of his brethren that he will live forever in history. What wonder if he, when of full size, may be moved, on slight temptation, to enter the lists, and to strive, at his life's peril, for the great rewards that accompany wholesale and patriotic homicide?

Small wonder then that the war superstition should have endured so long, that it should have been so general, that it should have been like the Christian Church, *semper, ubique, omnibus*.

Nor can we wonder that man should have been prone to war, when we consider his nature and his necessities. Like most other animals of creation he is a fighting animal. Whether with his nails and fists, or with a club, whether with a stone hatchet or an iron javelin, whether with sword or repeating rifle, he has always been ready and anxious to fight, and to kill something or someone. In the evolution from his humble beginnings, man has retained part of his inferior attributes. At times he is a model of strength and courage, then we dub him the lion-hearted, or he is greedy and timid, and with Homer we scorn him as a creature with the eyes of a dog and the heart of a doe, or he is crafty and unscrupulous in his dealings, and we style him a fox. Such are the varieties of his nature that we can always find a prototype for him in the catalogue of beasts. The inferiority of his origin still clings to him, and leaves the atavistic taint thus plainly perceptible. He will only acquire new and higher standards of comparison when unlike the lion his brother, and the dog his cousin, and the fox, his poor relation, he has raised himself to greater heights. When being a giant with a giant's strength, he forbears, because it is tyrannous to use it, when passion stands back in respectful obedience to take the commands of justice, when reason speaks first and last and is strong enough to stifle the voice of anger and foolish resentment, when this new era of development has taken the place of the old dispensation, then may we look for new standards of comparison; the ancient ones will no longer fit the situation.

Nor is the transmitted tendency alone to blame. Necessity, born of the primeval curse, suffered no intermission in the work of violence. So long as food was scarce, and could be had only



by strenuous exertion, and the struggle for life really meant a hand-to-hand contest with man and beast, so long was it certain that peace could only be bought with submission, and must wear the badge of servitude. The serf or slave must do the bidding of his lord as the price of protection from outside persecutors: the man on horseback did the fighting as his part of the contract. And as he exposed his life with generous courage he became the gentleman, partly because he wielded a sword and still more because he wielded no useful implement. To drive a furrow was the occupation of an inferior, to gladden the face of the earth with a harvest unworthy any but a vassal. Labor meant degradation; it fell only to the lot of those who were born to be the hewers of wood and the drawers of water. Even after Christianity had shed her light upon the dark spots of the world, the many must work for the few, and the few, because they did not work, were credited with a finer clay than that which made up the producer. But gradually, through the slow evolution of ages, the intelligence of the world was quickened and it was found easier to raise one's own bread than to wrest the bread of another by force of arms. The fashion copied from the locust swarms, of invading the neighboring territory and devouring its fruits, being mutual, became inconvenient. To own and to keep a field was found to be as profitable as to roll along in caravans eating up vast territories that became deserts because they would not bloom without labor,—and Labor is the twin brother of Security. The gentle example of the early monks was not without its weight. They laid the blessing of industrious hands upon the wilderness and the wilderness fled before them, making way for gardens that gladdened the eye and filled the mouths of the hungry. Wars kept on, sometimes for the pleasure of kings, sometimes because they could not be avoided, but in time fighting became a trade, and the soldier became a professional. The mass of the nation was allowed to do its work, harried, it is true, persecuted, despoiled, outraged and ruined, sometimes by one side, sometimes by the other, oftener by both, but on the whole labor had some opportunity to carry out its mission of civilization, and the laborer began to have a value.

Herein lies one of the first objections to the claims of war.

Killing has become much more expensive than in the old days when the serfs and villeins and canaille counted for so little. They have placed a higher value on themselves and the powers must, willingly or the reverse, accept their own valuation. A well-known historian with accustomed exaggeration, gravely tells his readers that a nobleman of France in the ante-Revolution days could not bathe his hands in the blood of more than one peasant on his return from the chase, a ghastly bit of pleasantry which need not be taken seriously. There is nothing in the history of the French nobility to show that their tastes ran in that direction. But allowing for such extravagances of statement, it is certain that the peasant's life was not then of any appreciable value, financially, to any but himself and his family. To him and them it meant much more than to the lord who had so many multiplying about him, after the fashion of the poor, that occasional and trifling réductions were of no great moment. Jacques Bonhomme, whether on French or German or English soil, discovered in time how valuable he was, and the consciousness had grown, and what is better still the great have found it out in their turn. It is not of course easy to place a value on human life. Estimates differ according to the subject, the locality, the value of money. We do know, however, that a strong man, with a stout heart and willing hands, is part of the moral and material wealth of the land; we know that to crush out that life with all its actual and potential good is a crime that cries out with the blood that mounts in vapor to the skies, bringing down by its mute but eloquent protest a benediction on all who will strive and pray and work to make such crimes rarer and rarer every day that the sun rises.

The historian of the late Franco-Prussian war tells us in a few lines that the Germans killed in one battle some twenty thousand brave French soldiers, and that the French on the same day slew and wounded the same number of brave German soldiers, and that the troops on both sides behaved very well. Forty thousand valiant men in one summer's day, the flower of two great countries, mangled to death, in many cases before they could see the instrument of their destruction, powerless many of them to show their courage, except by their patient endurance, standing up as

helpless victims before brutal and invisible agencies of death; forty thousand boys and men with unlimited treasures of usefulness to home and country in their strong hands, all gone in a breath, but with the consoling epitaph that they fought well! Did France and Germany, when they read that record, ask themselves if there was no other way to settle imaginary or even real disputes, than this? Did they count the cost and value of these lives and ask themselves whether in familiar phrase the game was worth the candle? Or were they satisfied on both sides the crimson stream, with the reflection that the dead men before they died had fought so well?

If this had been all! But these early hecatombs were but a foretaste of more to come. The new guns continued to do splendid work on both sides. The fame of Herr Krupp and his products grew with the victims of his formidable machinery of death. The needle-gun did fine execution, so did the chassepot and it is even yet a question with experts which of these two weapons can, under favorable circumstances, kill more men in a given time. Thus one of the objects of the great war failed, and it is not yet definitely ascertained whether the French had better take up with the needle-gun or the Germans with the chassepot. They are both excellent of their kind, and can make more widows and fatherless children in the twinkling of an eye, than Satan himself could have dreamed of a century ago.

If this, the most recent of the great wars, failed to settle this important question, what has it settled? The sole difference between the two nations had something to do with the Spanish throne and the Hohenzollern princes, yet in the treaty of Frankfort we find nothing that affects the succession to that throne, nor any limitation upon that family to accept such royal situations as they may please. But the treaty did in very plain terms provide that Germany should be rewarded with two French provinces, and four thousand million francs of French money. So that for twenty-six years past France has mourned over the loss of her two daughters and regretted the ill-use to which her treasury has been put; during the same period Germany has spent these millions over and over again lest the peace be broken

by which she keeps her new possessions. And that the circle of peace-loving nations may be complete, they all follow the same impulse and drag the men from the fields, and draw the coin from the treasury, to defend their provinces or, in the coming wreck of things, to secure those that belong to their neighbors. Thus are they all running a mad race to bankruptcy or mutual extermination to save their honor if it should be assailed, to protect their interests if they should be imperiled, to destroy their neighbors if it should be expedient.

Thus it is that the great Franco-Prussian war settled nothing, but unsettled everything! Thus it is that six nations of Europe spend annually eight hundred million dollars lest the peace be broken and keep three million men under arms for fear of war. Thus it is that ten million men are ready to take their designated places on the checkerboard of war as soon as the signal is given. A condition of things absolutely unknown since the world was made; a threat of horrors which the human imagination is powerless to picture. The very magnitude of the indescribable slaughter, confusion, ruin and desolation impending over the world is the safeguard of humanity; it affords a hope to the man who loves his kind. The time seems near at hand when utter exhaustion will do what sound reason has been powerless to accomplish. The blessings of national bankruptcy have not yet been fully appreciated by the victims of war.

How easily the calamity breeding war between these two great nations might have been avoided may readily be told. There was in fact no quarrel between them, although a growing jealousy, and a feeling that the continent was too small for the aggrandizement of both. It was not an injury in the past, nor a grievance in the present that divided them into hostile camps; it was the apprehension on the one side that at some future day something might be tolerated by the other which ought to be resented, if it happened to be done. On that other side the confidence, justified by the event, that if it came to hard blows Germany would derive a profit from her expenditure of men and money. In the temper of both there was little room for adjustment, except by friendly intervention. Great Britain made the offer and it is as certain as any event that has not actually

become a fact, that a frank understanding through this friendly aid would have dispelled the clouds. The treaty of 1856 to which both France and Germany were parties was invoked to make intervention possible, but France rested her refusal upon the liberty allowed each party to that instrument to be the sole judge in all matters which involved her dignity. Prussia also declined the golden opportunity and we know the result. France has atoned in the dust of defeat and the humiliation of a dismembered territory for this view of what constituted a nation's dignity. Her trials and sufferings have not been in vain if the world has learned a lesson from her fate, and if her victor, even in his triumph, has discovered that such triumphs may be too dearly bought.

The Franco-Prussian war has been selected and dwelt upon out of so many other wars, because it is the most recent and the most destructive and the most causeless of modern times. It is a barren study to inquire into the respective responsibility of either nation. The warlike instincts of both were aroused and where two men or two million men are anxious for a quarrel the malignant fates to which they listen so readily, are sure to afford the pretext. Like our own War of Secession the causes were sown many years before the victims fell upon the battle-field. These causes were deep in human nature and in past history. The fruit had grown and it must be plucked. But we are wiser to-day and know that there are other means of reconciling international quarrels than emulation in homicide. Strangely enough we, the youngest among the mighty nations of the world, have been schoolmasters for a hundred years. We have taught the possibility of ruling a great nation by law alone; we have taken the sceptre from kings and given it to judges, with advantage; we have suffered free speech and free writing to be pushed to the verge of lunacy and yet have kept our freedom. Unconsciously the nations of the world are looking to us and following with hesitating step in the paths that we have trodden. Since we have, at the expense of costly amputation, rid ourselves of the blight of slavery, we stand morally in the very vanguard of civilized mankind; while we have been great enough to fear no army or navy of the world, we have shown our greatness still

more conspicuously by our admiration of and devotion to peace. From the earliest days of our history we have condemned war as the enemy of the human race, from the earliest days we have advocated arbitration as the only reasonable method of adjusting disputes.

Over one hundred years ago the young Commonwealth made its first Treaty of Arbitration to settle the question of boundaries with Great Britain, and from that day until this she has never hesitated to control her resentments and to hold back the anger of her people that judgment and not violence might determine the right. From that time until to-day we have on forty-seven occasions appeared as parties in these international litigations. In every case we have accepted the verdict as fully and freely as though countless bayonets were ready to enforce it, until we have established a practice of justice and fair dealing which has called forth the admiration of the world. Great Britain, to her honor be it said, has not been far behind us in the example that we have given. She, too, has preferred law to violence, and the two great English-speaking nations have seized every opportunity to resort to the forms of justice which appeal to their reason, rather than to indulge those instinctive resentments which are part of man's inferior nature. There are few more hopeful signs in the history of Arbitration than that between Great Britain and the United States which is known as the Geneva Arbitration. It is the most conspicuous instance of a resort to friendly adjustment where provocation was so great, for our people had indeed suffered under a real and bitter grievance. When the very existence of the nation was in jeopardy, when brother was arrayed against brother and the whole fabric of our government was tottering to possible ruin, a friendly nation connived at efforts of the Union's enemies, and indirectly aided in their attempts at our disruption. If there is anything more difficult to forgive than injury we have suffered, it is the injury that we have inflicted. Both nations therefore had much to forgive and much cause for resentment, but they mastered the temptation, and the result was the great lesson of the century. Since this great object-lesson in International Arbitration, it is idle to talk of insurmountable obstacles in the way of promoting

peace. If the United States could condone the depredations of the Alabama, and Great Britain could pay for them as she did, arbitration must be easy. But it was never so easy as to-day. All the civilization of the age is against war, and its intelligence, and learning, its science and its art, its greater tenderness for human life, its love of the beautiful, its commercial interests, all these are co-operating in harmonious solicitude to drive war from the face of the earth. The world knows too much to put its faith in war. What has war ever done to settle great questions? I speak not of defensive wars, of resistance to unjust aggression, for these may no more be condemned than the effort that the peaceful traveler makes to resist the banditti who look to his purse. Nations may be broken up and divided as in the case of the early colonies and Great Britain, and of the several American Republics and Spain; war then seems unavoidable, for the bonds that have become oppressive can only be rent by force. I speak of war as a conflict between two independent nations, striving to obtain satisfaction for wounded honor, or to settle a boundary question, or to collect a financial claim. This procedure as a means of obtaining justice is fast becoming obsolete. And how should it be otherwise? Montaigne has truly said that "the envy or spite of one single man, his pleasure, or a fit of domestic jealousy, causes that ought not to excite two fishwives to scratch one another's faces,—these have been causes enough for great trouble." But despotic rulers with this power for mischief are fortunately rare. The people must be consulted about war and have a voice on the subject.

There is no more formidable obstacle to causeless international conflict than the newspaper, provided the soldier can read it, which in our country at least he generally can do. True, the newspaper sometimes indulges for temporary purposes in wordy effervescence, and seeks to stimulate the fighting spirit for no wholesome end, but upon the whole the influence of the press is an influence of peace. The press realizes the value of international harmony from the standpoint of commerce, and on grave occasions is ready to advise against violence, to deprecate rashness, and to prefer reasonable settlement to violent experiment. It has done much to prevent war by bringing vivid pictures of

its horrors into every home, by tearing off some of its fine but false pretenses, by showing its ghastliness and ruthless destruction, as they were never shown before. Butchery unadorned is not a pleasant subject of contemplation. The war correspondent has been an apostle of peace; he has made his pen pictures preach an unconscious sermon to his readers. The pity of it never struck the looker-on as it does to-day. We generally saw war at a great distance as through a glass, darkly, and heard but a vague and uncertain echo of the turmoil. The heinousness of the crime of causeless war was never fully realized until it was felt that this was not the only means of vindicating national rights. It is possible to settle questions without violating all the commandments; it is not impossible to preserve national self-respect without the sacrifice of human victims. The boy who has grown into manhood after passing through years of schooling is soon taught these things, and learns that he himself has a certain importance. He may be only a pawn on the chess-board, but pawns may check the king. He may overrate but certainly does not underestimate his importance, and readily learns that he has a real if uncertain cash value. He does not care of his own free choice to shoulder a musket, even of the latest pattern, unless it is plain to him that the honor of his country is at stake. He is above all things practical. He will lay down his life if needs be, as bravely as the off-shoot of any other race, but he will not be contented with a vague formula; he must have a reason for leaving his workshop or his farm to put on a uniform, and looks to the press to tell him what the quarrel is about. He has been told and taught and is ready to believe that quarrels can be settled by judges as well where millions of men are concerned on each side, as where single litigants are engaged in vindicating their respective rights.

He is practical and therefore wants a real solution. He wants a decision that settles something. He knows that wise and honest men who have carefully studied the evidence are more likely to reach the requirements of justice than armed troops however brave, with their commanders however patriotic! The wisest and best of the soldiers whom he has known have admonished him against war. "War is hell," said General Sherman, and



this monosyllabic description can scarcely be improved in brevity and truth. He had seen it at its worst, and had emerged from it one of the idols of his people, but he knew, because he had seen, that the horrors that we can only imagine as the accompaniments of perdition may alone give an adequate idea of the horrors of real war.

General Grant, who stands as high in our esteem as any commander since Washington, also denounced the expense and savagery of war to his people. He told them in accents the sincerity of which no man can doubt, that he never knew a quarrel which could not have been better composed by friendly adjustment, than by resort to war.

Such authorities as these will more than outweigh the few exceptions which we find to pat war on the back as a blessing, and to praise it as a divine agency for good. Hegel, for instance, says that war is not an absolute evil and that perpetual peace would be a condition of moral stagnation for the nations. De Maistre adopting a higher tone declares that war is a divine fact, an instrument of the Kingdom of Providence destined to the necessary expiation of the crimes of men. The soldier and the executioner, he thinks, are both professional killers who should be equally honored. It is a pity that such writers of paradox cannot find a less ghastly subject for the exercise of their unconscious humor. The most conspicuous advocate of war in modern times, however, is Marshal Moltke. "War," he says, "enters into the views and designs of Providence; it is a means for the people worthy of fulfilling their object on earth, a divine mission not to fall into decay and to retemper the edge of their manhood." A curious way indeed of avoiding decadence, and an expensive one. Was it necessary to slaughter the 40,000 unfortunate men on the field at Vionville and St. Privat in order to retemper the manhood of these two great nations? How many soldiers should be slain, and how many villages burned, and how many provinces devastated before the highest culture is reached? When and how can we be certain that decadence is stayed, and that progress requires no further killing of men? Who shall furnish periodical and plausible pretexts for war to be applied when the necessity arrives, not that justice may have her sway,

but that men may not be pampered into effeminacy by the charms of peace? We might ask this great warrior when he discovered and how, that war entered into the views and designs of Providence; what winged messenger of the Prince of Peace vouchsafed for his private illumination the fearful fact that war was permitted to nations worthy of fulfilling upon earth a divine mission, to preserve them from decay. If we can feel quite sure that this accomplished soldier really was inspired to express such appalling sentiments, we must despair of the future of the world. Then; indeed, may peace veiling her tear-stained face fall at the feet of the great warriors, proclaim her abdication and yield her sweet offices to the demands of bloody war.

No, neither Marshal Moltke, nor others who may take the same dark view of the tendencies of the human race, can stem the current and beat down the rising tide. The world has supped full of horrors and slaughter and needless destruction for thousands of years and when the dawn appears on the horizon we may be assured that the sunshine is about to rise; we know that the storm is over when the sky is red.

It is true that the more humane civilization of the age has sought to mitigate the cruelties inseparable from a condition of war. The victorious army no longer turns its prisoners into food. The vanquished are no longer sold as slaves for the enrichment of the captors; they are treated with such humanity as the situation of the parties permits. But nevertheless the horrors and destruction incident to modern warfare are ascending in a rapidly increasing ratio. The ingenuity of man is nowhere more manifest than where he devises means for dealing death upon his fellows. While, as we have seen, there may be a rational difference of opinion as to the comparative merits of the chassepot and the needle-gun, the race has not stopped. One nation has devised a new rifle which is spoken of with delight and admiration by experts; it is a gem as an agent of speedy annihilation. The bullet has emerged from the elementary condition as a simple perforator of the human organs, for it has been taught, while it breaks the bone, at the same time to pulverize it, so that the great advantage is presented by its use not only of temporarily disabling the smitten limb, but of insur-

ing against recovery of the victim, the superadded benefit of compulsory amputation being among the rewards of the new plan. Besides, the bullet itself is encased in nickel plate, thus affording in its improved appearance an artistic presentation of improved capacity for mischief which deserves admiration and praise, if it be inspired by Providence to prevent national decay.

Thus for the smaller weapon which can only deal death at the rate of three or four men to one bullet. But the main progress seems to be in the production of the huge monster whose powers to mow down columns of men like blades of grass have been greatly increased. The new Canet gun which appears to have been adopted as a peace-preserver by the French government will throw a shell loaded with 300 bullets five times a minute with a range of seven thousand yards. But Herr Krupp is not to be undone by these Gallic efforts to avoid war, and it is mysteriously said that he has contributed to the good cause a still more eloquent advocate of German philanthropy. It is suggested in addition that such improvement in armaments will require additions to the army, which will be increased in France by 75,000 men, naturally necessitating the same addition of guardians of the peace on the side of Germany. We are thus rapidly approaching the hitherto unknown condition where huge armies will destroy each other before either is visible to the other save through a telescope. Perhaps this intolerable progress is to be the means, in the designs of Providence, for averting a conflict which no man can contemplate without the feeling that a new vista of horrors may teach the world, at any moment, that the wars of the past have been as the games of children.

If the advocates of war will only ponder upon these things, and try to bring before the eye of their fancy an image of the possibilities which they are striving to turn into probabilities, they may conclude that the blood-letting which they so cheerfully advocate may not be regulated according to hygienic principles. The life blood of a nation is too precious to be left to the mercy of experts, who are experts only in shedding it, but who are not always able to stop the flow of the life-giving fluid, after they have started it. For war is cruel and wasteful at its best, and we may expect to see it at its worst when it next breaks

out; what that worst may be imagination cannot picture, for there is nothing in the records of the past to afford facilities of comparison.

To-day the United States and Great Britain are striving to crown the glories of this dying century with something better and greater than the world has seen. It is proposed to abolish homicide as a test of international right, by submitting causes of dispute to the calm judgment of wise men; a solution so simple and so economical that it requires great ingenuity to assail it with plausible reasons. All concede that in theory the plan is admirable, that in practice on a limited scale it has proved of priceless value, that it is infinitely more likely to produce rational results, than the only other alternative, viz.: resort to war.

But, say the objectors, what if our national honor should become involved? A momentous question indeed, and one absolutely impossible of reply, until we are told what is this national honor, wherein it lies, and how best it may be asserted. In what one of our many differences with Great Britain has our honor become so involved that the delicacy of its constitution required a prompt and vigorous regime of blood and iron? And yet we have had hot and long disputes where honor might have been called to the front by either nation, and made the pretense for a refusal to arbitrate. A nation's honor, I would venture to say, is never compromised by temperance nor injured by forbearance. A nation's honor is not served by rash counsels, nor by violent impulses recklessly indulged in. It is indeed a frail and delicate possession, if it cannot live in an atmosphere of peace, it is a dangerous one if it is tarnished by friendly discussion and a disposition to hearken to the voice of justice. National honor may perhaps shine all the brighter when a great nation is slow to admit that her just dignity may be imperiled by the act of others. The honor of a nation is in her keeping, not in that of her neighbors; it cannot be lost save by her own act. To preserve her honor should be her main object and purpose, but she should not readily believe those who tell her that by hard blows alone may its integrity be protected. A nation's honor consists in fidelity to her engagements, in carrying out her contracts in spirit as in the letter, in paying her just debts, in

respecting the rights of others, in promoting the welfare of her people, in the encouragement of truth, in teaching obedience to the law, in cultivating honorable peace with the world. How can our national honor be so grievously invaded that there can be no room for remonstrance, no time for discussion, no opportunity allowed the aggressor for amendment? Spain within a few years offended Germany most grievously, and it was said insulted her flag, but Germany nevertheless arbitrated with Spain, and allowed the Pope to decide the question at issue. Has Germany's honor suffered thereby? We seized British ships in the Behring Sea and condemned them in our ports, a most grievous insult according to the sensitive and self-constituted custodians of British honor, but Great Britain adopted peaceful counsels, and a wise court heard, examined and decided the case without any apparent injury to British honor. Why is war a more reliable defender of our national honor than arbitration? Readiness to fight may serve to prove that our country is not afraid to fight, but the world knows that to-day and needs no proof. War may prove that we have a gallant people behind our government ready to spend life and fortune for a good cause, but the world knows that of old. Why renew that proof? War may show that our financial resources are practically inexhaustible, and that we are able to build and buy the most approved engines of destruction, but that, too, is of public notoriety. Let us not call witnesses where the facts are conceded, nor embark upon expensive methods to satisfy the world of what the world is already quite convinced. As with men honor often means pride unembarrassed by scruples, so it may be with a nation. The standard with men differs according to latitude and surroundings, to social institutions and traditions, to civilization, religion, and many things. Men resort to the shotgun, the revolver, the bowie knife or the club to heal or defend their honor, and lose it as often as they mend it. The effort of civilization has been for years to teach them that violence is not the safest champion of offended dignity, that the methods of the bravo, the manners of the ruffian or the tyranny of the bully may best be dealt with by a firm court and an officer of the law. Why should nations be prompt to seek redress through

force, so long as reason may be heard and reason's voice is still respected?

Bluster with nations as with individuals is dying out. It is heard at times, but its voice squeaks, and shows senility. It cannot as of old arouse a nation into unthinking wrath nor drive it from its propriety. The wisdom and the experience of the world are against it.

It was a favorite saying of Napoleon, he had borrowed it from Montesquieu, that no man is strong enough to fight against *la nature des choses* (the nature of things). It will get the best of him in the end, for the moral forces of nature are based on immutable and eternal principles; they will not be put down. They may be delayed, but they cannot be stayed.

The day has gone by when honorable preferment could only be gained in war. The splendid triumphs of peace are winning over the heart of man from the glories of war. Perhaps the boy of to-day, by the time he has cast his first vote, may think it as well to be an Edison as a Napoleon, a Pasteur as a Wellington, a Franklin as a von Moltke, to build as to destroy, to save as to kill, to love as to hate. To labor for his bread, and to earn it by the sweat of his face is the curse, mercifully transformed into a blessing, but labor must and shall enjoy its rewards in peace. The divine founder of the Christian Church gave His peace and left His peace to those who followed Him as a priceless gift; now His followers with insistent prayer that has been growing into irresistible volume demand of their rulers that this inheritance shall not be taken from them on vain and shallow pretexts. Order has become the watchword of a growing civilization and order means the law, not the law of violence, not the law facetiously called the law of war,—that is the law of lawlessness,—but the law which grows from a living sense of justice, which depends upon reason, which invokes patience.

The war of the future shall be the bloodless war of right against wrong, of good against evil, of truth against falsehood. We have had bitter and bloody wars called wars of religion, but the universal rule is to-day toleration and charity in the realm of conscience; can we, shall we in the light of nineteen

centuries of Christianity ever see such wars again? We have had great wars of succession, but the successions of kings and presidents are settled by law, and the claim to rule as of Divine right, if ever made, causes a smile of courteous commiseration. Wars of conquest have devastated the world, but who seeks to-day to remove his neighbor's landmark? The grave causes of war that made deadly conflicts as inevitable as they were frequent have died out.

The old element of personal prowess too is fast disappearing. Fancy the grim veterans of Napoleon's Old Guard as with steady eye and steady step they marched with glistening bayonets to decide the day, cool as on a holiday parade, ready to die for their great leader's fame, knowing but one duty and doing it, fancy them to-day with modern weapons mocking their courage and bidding them die before they could reach their foe; fancy our gallant Sheridan with his Winchester braves charging a battery of guns that kill at five miles distance or meeting infantry that was dealing out death at such rate that personal gallantry meant only patient endurance of certain death. Let those who talk of war and its glories ponder upon these things and remember to what they would condemn the men whom they so flippantly enlist for the battles of the future. The prejudices, caprices, errors and passions of men may defer the hour of triumph, but come it must; the constant tendency of man is towards peace, as soon as he emerges from the primitive condition wherein he most closely resembles the inferior tenants of the earth. Individually he longs for rest and the enjoyment of life. He undergoes hardship that he may have security and ease. Two thousand years ago the Roman poet expressed it in his graceful verse that can only be inadequately transferred into English:—

Caught in the wild Egean Seas  
The sailor bends to heaven for ease,  
While clouds the fair moon's lustre hide  
And not a star his course to guide.  
Furious in war the Thracian prays  
The quivered Mede, for ease, for ease,  
A blessing never to be sold,  
For gems, for purple, or for gold.

The good fight of peace, and for peace, is fairly won. Honor to those who have achieved it, and shown themselves the friends of the human race. The great consummation may be deferred, but come it will. As Hamlet said of death: If it be now, 'tis not to come; if it be not to come, it will be now; if it be not now, *yet it will come.*



## THE SUPREME COURT ON THE MILITARY STATUS.

The Court of Appeals of the District of Columbia has said that there is "some room for question" whether the provisions of the Fifth and Sixth Amendments of the constitution of the United States, which prescribe that no man shall be deprived of life, liberty, or property without due process of law, and that in criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation against him, apply to persons in the military service<sup>1</sup> — meaning, of course, in their military relations; for when a person enters the military service he does not cast off his ordinary obligations as a citizen, but enters into a new relation in addition to the old. That the administration of military justice, or the system of court-martial procedure, is not controlled by the amendments of the constitution, had been strongly presented to the court in argument, but as the matter at issue could be decided without answering this question, it was avoided. It is not easy, perhaps, for the civil courts to appreciate that the soldier, in his military relation, has entered a new jurisdiction entirely separated from and beyond the reach of their jurisdiction and even of the amendments of the constitution. Nevertheless, it would have saved a great deal of trouble in *Armes'* case, if the court had been more positive. Although the decision in that case fully sustained the military authority, this question was left very much in the same condition in which it was found. But it is one of the greatest importance, with reference to which our standing should be secure. Let us see what may be gathered from the opinions of the Supreme Court of the United States, for that court has explained the military status in such manner that we ought to be able to see our way in the future.

<sup>1</sup> *Closson v. Armes*, 7 App. D. C. 460.

"Nor be deprived of life, liberty, or property, without due process of law." "This," says Story,<sup>1</sup> "is but an enlargement of the language of Magna Charta, '*nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, vel per legem terrae*' (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words, *per legem terrae* (by the law of the land), mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law."<sup>2</sup> So that this clause in effect affirms the right of trial according to the process and proceedings of the common law."<sup>3</sup>

And Kent says: "The words, *by the law of the land*, as used originally in Magna Charta, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of *due process of law* is, that it means law in its regular course of administration, through courts of justice."<sup>4</sup>

And Mr. Justice Curtis, delivering the opinion of the Supreme Court in the case of *Murray's Lessee v. Hoboken Land and Improvement Company*,<sup>5</sup> said:—

"The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*. Lord Coke, in his commentary on those words,<sup>6</sup> says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the Federal constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.' The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.

<sup>1</sup> Story on the Constitution, Sec. 1789.

<sup>2</sup> 2 Inst. 50, 51; 2 Kent's Com. Lect. 24, p. 10 (2d ed., p. 18); Cave's English Liberties, p. 19; 1 Tuck.

Black. Comm. App. 304, 305; Barrington on Statutes, 17; *Id.* 86, 87.

<sup>3</sup> *Id.*

<sup>4</sup> Kent's Com., Vol. 2, p. 18.

<sup>5</sup> 18 How. 272.

<sup>6</sup> 2 Inst. 50.

“The constitution of the United States, as adopted, contained the provision, that ‘the trial of all crimes, except in cases of impeachment, shall be by jury.’ When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the State constitutions, and in the ordinance of 1787, the words of *Magna Charta*, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, ‘law of the land,’ without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on *Magna Charta*, had declared to be the true meaning of the phrase, ‘law of the land,’ in that instrument, and which were undoubtedly then received as their true meaning.”

And in *Callan v. Wilson*, Mr. Justice Harlan remarked as follows:—

“The third article of the constitution provides for a jury in the trial of ‘all crimes, except in cases of impeachment.’ The word ‘crime’ in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the constitution to hold that no prosecution for a misdemeanor is a prosecution for a ‘crime’ within the meaning of the third article, or a ‘criminal prosecution’ within the meaning of the Sixth Amendment. And we do not think that the amendment was intended to supplant

that part of the third article which relates to trial by jury. There is no necessary conflict between them. Mr. Justice Story says that the amendment, 'in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed (which district shall be previously ascertained by law), and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes. Story on the Constitution, Section 1791. And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property.'<sup>1</sup>

Mr. Justice Harlan further remarked that according to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offences that may be proceeded against summarily, and without a jury; and, in respect to other offences, the constitutional requirement is satisfied if the right to a trial by jury in an appellate court is accorded to the accused.

This would not, however, apply to the trial by court-martial, which may be for a capital offence, and from which there is no appeal. If this trial is "due process of law," it would seem that it must be governed by the constitutional safeguards relating to the trial by jury. But the history of military law shows that the trial by court-martial, so far from being "due process of law," was the creation of an independent system, entirely separated from it. This was recognized in the British Mutiny Act, to which we trace our court-martial system. "Provided always,

<sup>1</sup> 127 U. S. 549.

that nothing in this act contained shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law." Manifestly the ordinary process of law here referred to was quite a different and separate system from that which the act was legalizing. The trial by court-martial is not due process of law, but exists under the constitution, by virtue of a power unconnected with and independent of those provisions which relate to the ordinary judicial proceedings.<sup>1</sup>

Mr. Justice Davis, delivering the opinion in *Ex parte Milligan*,<sup>2</sup> made these observations. He said, that the provisions of the constitution on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to the case were found in that clause of the original constitution which says: "That the trial of all crimes, except in cases of impeachment, shall be by jury," and in the fourth, fifth, and sixth articles of the amendments. These securities for personal liberties thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

The discipline necessary to the efficiency of the army and navy, he said, required *other and swifter modes of trial than are furnished by the common law courts*; and, in pursuance of the power conferred by the constitution, Congress had declared *the kinds of trial, and the manner in which they shall be conducted*, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, *while thus serving, surrenders*

<sup>1</sup> See an article on "The Articles of War" in the first number of the *Journal of the Military Service Inst.*; also a paper on "The Relation of the

Military to the Civil Power;" and brief of appellant, in the case of *Closson v. Armes*.

<sup>2</sup> 4 Wall. 2.

*his right to be tried by the civil court.* All other persons, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury.

The minority opinion in this celebrated case was delivered by the Chief Justice; Justices Wayne, Swayne and Miller concurring. Referring to the exception in the Fifth Amendment with reference to the land and naval forces, and the militia when in service, he said:—

“Now, we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The States, most jealous of encroachments upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces. Thus Massachusetts proposed that ‘no person shall be tried for any crime by which he would incur an infamous punishment or loss of life until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land forces.’ The exception in similar amendments, proposed by New York, Maryland, and Virginia, was in the same or equivalent terms. The amendments proposed by the States were considered by the first Congress, and such as were approved in substance were put in form, and proposed by that body to the States. Among those, thus proposed, and subsequently ratified, was that which now stands as the Fifth Amendment of the constitution. We cannot doubt that this amendment was intended to have the same force and effect as the amendment proposed by the States. We cannot agree to a construction which will impose on the exception in the Fifth Amendment a sense other than that obviously indicated by action of the State conventions.

“We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment.”

Although the opinion of the court in this case is not so explicit in its language as that of the minority in stating that the

government of the land and naval forces is not affected by the amendments, this would seem to have been in Justice Davis' mind also. The separateness of the jurisdictions was evidently before him when he said that the discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts, and therefore Congress, in pursuance of power conferred by the constitution, had declared the kinds of trial, and the manner in which they should be conducted, for offences, committed by persons in the military and naval services—that is, offences against these jurisdictions, for, except in so far as the person who enters either service thereby assumes new obligations, his obligations existing before his entry into service remain in force, modified, however, to some extent by his new status.

But in the case of *Dynes v. Hoover*,<sup>1</sup> the Supreme Court expressly recognizes the independence, within their own special and limited spheres, of the military and naval systems, or at least of that part of them which relates to court-martial jurisdiction. Citing the provisions of the constitution giving Congress the power to provide and maintain a navy (this was a case arising in the navy), and to make rules for the government and regulation of the land and naval forces, and the Fifth Amendment which excepts cases arising in the land or naval forces from the requirement of a presentment of a grand jury in cases of capital or otherwise infamous crime, and the clause declaring the President to be commander-in-chief, the Supreme Court (Mr. Justice Wayne delivering the opinion) said that these provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the third article of the constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other. Courts-martial derive their jurisdiction and are regulated with us by an Act of Congress, in which the crimes that may be committed, the manner of charging the accused, and of

<sup>1</sup> 20 How. 65.

trial, and the punishments which may be inflicted, are expressed in terms; or they may get jurisdiction by a fair deduction from *the definition of the crime*. What these crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts-martial and the offences of which they have cognizance. With the sentences of courts-martial which have convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. "If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."

"Of questions not depending upon the construction of the statutes," said Mr. Justice Gray, in *Smith v. Whitney*, "but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law."

And in the case of *Kurtz v. Moffitt*, he said, that in the United States the line between civil and military jurisdiction has always been maintained;<sup>1</sup> that the Fifth Article of Amendment of the constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury," expressly excepts "cases arising in the land or naval forces," and leaves such cases subject to the rules for the government and regulation of those forces which, by the eighth section of the first article of the constitution, Congress is empowered to make; that courts-martial form no part of the judicial system of the United States; that their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts; and that Congress has never conferred upon civil officers or magistrates or

<sup>1</sup> See the remarks of Mr. Justice Brown, in *U. S. v. Clark*, 31 Fed. Rep. 718.



private citizens any power over offenders punishable only in a military tribunal. Agreeably to this view, neither a peace officer nor a private citizen could, without legislative authorization, arrest a military offender, without a warrant, but a military officer could.

The exposition of the law, given in *Dynes v. Hoover*, has been repeatedly affirmed by the Supreme Court.<sup>1</sup>

Commenting on the decision of the Supreme Court, in *Dynes v. Hoover*, the Supreme Court of the District of Columbia, In re Esmond et al.,<sup>2</sup> said that we have the authority of that case for applying the principles laid down in *Ex parte Bigelow*<sup>3</sup> to the proceedings and judgment of a court-martial in a case where the court had jurisdiction of the offence and of the person accused. "In the case before us," said the court, "it is clear that the court-martial had jurisdiction of the kind of crime for which the petitioner was tried, and of the person of the prisoner. Having these, it had, in the language of *Bigelow's* case, 'jurisdiction to hear and decide upon the defences offered by him,' and 'the matter now presented (*autrefois acquit*) was one of these defences.'"<sup>4</sup> And referring to the provisions of the constitution mentioned, the court said:—

"These provisions contemplate the establishment by Congress of two distinct systems of jurisdiction for the punishment of crime, and that each should be complete and sufficient. In other words, they import that the power of Congress 'to make rules for the government of the land and naval forces' includes power to establish institutions for the trial and punishment of crimes committed by persons in the land and naval forces, whose action and judgments shall be as conclusive for all purposes as the action and judgments of any other tribunals can be.

"If such tribunals have actually been established, their judgments must be treated precisely as the judgments of the courts of the other system of jurisdiction are treated.

<sup>1</sup> *Ex parte Reed*, 100 U. S. 13; *landigham*, 1 Wall. 243; *Ex parte Wales v. Whitney*, 114 U. S. 564; *Smith Milligan*, 4 Wall. 123; *Swain v. United States*, 165 U. S. 553.  
<sup>2</sup> *Ex parte Bigelow*, 116 U. S. 167; *Kurtz v. Moffitt*, 115 U. S. 487; *Coleman v. Tennessee*, 97 U. S. 514; *Ex parte Val-*

<sup>3</sup> 5 Mackey, 64.

<sup>4</sup> 113 U. S. 328.

“In the light of its constitutional authority to do so, it is clear to us that Congress has intended by the articles of war to establish such a system. In addition to courts for trial, it has provided a separate and complete line of reviewing authorities, terminating in the same executive, who is authorized to pardon officers tried in the other courts of the United States.

“It is clear on principle, that these tribunals have power to adjudicate conclusively whatsoever they have power to adjudicate at all.

“This general principle, applicable to all courts of final jurisdiction, has been applied by the Supreme Court of the United States to the judgments of courts-martial.”

There can thus be no doubt as to the views of the Supreme Court with reference to the independence and completeness within its sphere of action, that is, within its jurisdiction, of the court-martial system. But this principle is not limited to the court-martial system, which indeed is only a part of a general system founded on the same constitutional powers. So far as the power of State courts is concerned, the Supreme Court (Mr. Justice Field delivering the opinion) has held<sup>1</sup> that they should refuse the writ of habeas corpus, when it appears on the application that the person is confined under the authority, or claim or color of authority, of the United States, by an officer of that government. And in the case before it the court held that a State officer, having general power to issue the writ, was without authority to issue it for the discharge of the prisoner, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the national government.<sup>1</sup>

So Mr. Justice Miller said,<sup>2</sup> that in the case of a man in the military or naval service, where he is, whether as an officer or a private, always more or less subject in his movements, by the very necessity of military rule and subordination, to the orders of his superior officers, it should be made clear that some un-

<sup>1</sup> Tarble's case, 13 Wall. 397. And see Ableman v. Booth, 21 How. 506.      <sup>2</sup> Wales v. Whitney, 114 U. S. 571.

usual restraint upon his liberty of personal movement exists to justify the issue of the writ; otherwise every order of the superior officer directing the movements of his subordinate, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of *habeas corpus*.

But, although the court-martial system is within its jurisdiction complete and independent, the judgment of a court-martial may be questioned collaterally. In *Runkle v. United States*,<sup>1</sup> the Supreme Court made the following statement of this:—

“A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved.<sup>2</sup> Such also is the effect of the decision of this court in *Wise v. Withers*,<sup>3</sup> which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*,<sup>4</sup> ranked a court-martial as ‘one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law.’<sup>5</sup> There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in *Brown v. Keene*,<sup>6</sup> in respect to averments of jurisdiction in the courts of the United States, applies. His language is: ‘The decisions of this court require, that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.’ All this is equally true of the pro-

<sup>1</sup> 122 U. S. 555.

<sup>2</sup> 3 Greenl. Ev., Sec. 470; *Brooks v. Adams*, 11 Pick. 441, 442; *Mills v. Martin*, *supra*; *Duffield v. Smith*, 3 S. & R. 590, 599.

<sup>3</sup> 3 Cranch, 381.

<sup>4</sup> 3 Pet. 193, 207.

<sup>5</sup> *Dynes v. Hoover*, 20 How. 65, 80; *Mills v. Martin*, 19 Johns. 33.

<sup>6</sup> 8 Pet. 112, 115.

ceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively."<sup>1</sup>

But, when a court-martial has cognizance of the charges and jurisdiction of the person, and acts within the scope of its lawful powers, whatever irregularities or errors may have occurred in the proceedings, its sentence must be held valid when questioned in a collateral way.<sup>2</sup>

The *status* of a person is his legal position or condition. Thus, when we say that the status of a woman after a decree *nisi* for the dissolution of her marriage with her husband has been made, but before it has been made absolute, is that of a married woman, we mean that she has the same legal rights, liabilities and disabilities as an ordinary married woman. The term is chiefly applied to persons under disability, or persons who have some peculiar condition which prevents the general law from applying to them in the same way as it does to ordinary persons. The question of status is of importance in jurisprudence, because it is generally treated as a basis for the classification of law, according as it applies to ordinary persons (general law, normal law, law of things), or to persons having a status, *i. e.*, a disability or peculiar legal condition, such as infants, married women, lunatics, convicts, bankrupts, aliens, public officers, etc. (particular law, abnormal law, law of persons).<sup>3</sup>

By enlistment a person acquires a new status. This was fully set forth by the Supreme Court in *Grimley's case*,<sup>4</sup> from the decision in which (delivered by Mr. Justice Brewer) a liberal extract is made:—

“But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for

<sup>1</sup> The question, how far a civil court may go in determining whether a subject-matter is within the scope of military jurisdiction, has been considered elsewhere under the head of “The Relation of the Military to the Civil Power.”

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<sup>2</sup> *Keyes v. U. S.*, 109 U. S. 836; *Swain v. United States*, 165 U. S. 553; *Johnson v. Sayer*, 158 U. S. 109.

<sup>3</sup> *Rapalje & Lawrence's Law Dictionary*.

<sup>4</sup> 137 U. S. 147.

damages. Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife, no matter what their conduct to each other—no matter how great their disregard of marital obligations. It is true that courts have power, under the statutes of most States, to terminate those contract obligations, and put an end to the marital relations. But this is never done at the instance of the wrongdoer. The injured party, and the injured party alone, can obtain relief and a change of status by judicial action. So, also, a foreigner by naturalization enters into new obligations. More than that, he thereby changes his status; he ceases to be an alien, and becomes a citizen, and when that change is once accomplished, no disloyalty on his part, no breach of the obligations of citizenship, of itself, destroys his citizenship. In other words, it is a general rule accompanying a change of status, that when once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof. Especially is he debarred from pleading the existence of facts personal to himself, existing before the change of status, the entrance into new relations, which would have excused him from entering into those relations and making the change, or if disclosed to the other party, would have led it to decline admission into the relation, or consent to the change.

“By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State,

would not have entered into the new relations with him, or permitted him to change his status. Of course these considerations may not apply where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations. But where a party is *sui juris*, without any disability to enter into the new relations, the rule generally applies as stated. A naturalized citizen would not be permitted, as a defense to a charge of treason, to say that he had acquired his citizenship through perjury, that he had not been a resident of the United States for five years, or within the State or Territory where he was naturalized one year; or that he was not a man of good moral character, or that he was not attached to the constitution. No more can an enlisted soldier avoid a charge of desertion, and escape the consequences of such act, by proof that he was over age at the time of enlistment, or that he was not able-bodied, or that he had been convicted of a felony, or that before his enlistment he had been a deserter from the military service of the United States. These are matters which do not inhere in the substance of the contract, do not prevent a change of status, do not render the new relations assumed absolutely void. And in the case of a soldier, these considerations become of vast public importance. While our regular army is small compared with those of European nations, yet its vigor and efficiency are equally important. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed. Now, there is no inherent vice in the military service of a man forty years of age. The age of thirty-five, as prescribed in the statute, is one of convenience merely. The government has the right to the military service of all its able-bodied citizen; and may, when emergency arises, justly exact

that service from all. And if for its own convenience, and with a view to the selection of the best material, it has fixed the age at thirty-five, it is a matter which in any given case it may waive; and it does not lie in the mouth of any one above that age, on that account alone, to demand release from an obligation voluntarily assumed, and discharge from a service voluntarily entered into. The government, and the government alone, is the party to the transaction that can raise objections on that ground. We conclude, therefore, that the age of the petitioner was no ground for his discharge."

In this case it was held that the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier.

And in *Morrissey's case*,<sup>1</sup> the Supreme Court applied the principle of a change of status to the enlistment of a minor, holding that the age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature; that Congress has declared that minors over the age of sixteen are capable of entering the military service, and undertaking and performing its duties; that an enlistment is not a contract only, but effects a change of status, and is not, therefore, like an ordinary contract, voidable by the infant; that *Morrissey's* contract of enlistment, he having enlisted when seventeen years of age, was good so far as he was concerned; and that he was not only *de facto*, but *de jure*, a soldier — amenable to military jurisdiction.<sup>2</sup>

<sup>1</sup> 137 U. S. 157.

<sup>2</sup> Mr. Justice Brown, now of the Supreme Court, rendered a decision in the Circuit Court, Eastern District of Michigan, *In re Cosenow* (37 Fed. Rep. 668), which is of great value in considering the status of the enlisted minor. He held that an enlistment contrary to law is not void, but voidable; that if the soldier and his guardian both consent to his serving, the enlistment is binding; and that the only object of obtaining the consent of the guardian in writing is that it

could not be retracted. So long as the verbal consent of the parent or guardian is not withdrawn by the commencement of proceedings to obtain his release, the recruit is bound to military service, and is subject to the rules and articles of war. But if he be under sixteen years of age, the enlistment is voidable at the election of the minor himself, under Section 1118 Revised Statutes of the United States.

As to the liability of a minor to be tried by a court-martial for any military offence committed after his en-

With acts affecting military rank or *status* only, said Mr. Justice Gray,<sup>1</sup> or offences against articles of war or military discipline, the civil courts have uniformly declined to interfere. No acts of *military officers or tribunals, within the scope of their jurisdiction*, can be revised, set aside, or punished, civilly or criminally, by a court of common law. But for a malicious exercise by a military officer of lawful authority; or for acts of a military officer or court, in excess of authority, though done in good faith, toward those in the military service, and *a fortiori* toward those who are not, when the civil laws are in full force, the person injured may obtain redress in the ordinary way, by suit against the wrongdoer. So Mr. Justice Miller, in *Bates v. Clark*,<sup>2</sup> said, that it is a sufficient answer to the plea, that the defendants were subordinate officers acting under orders of a superior, to say that whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace

listment, the cases, he said, are nearly uniform; and he cited, among others, the case of *Wilber v. Grace*, 12 Johns. 68, in which the court held, that the question is not whether the contract is valid or void, nor whether the soldier is entitled to be discharged from the service. The contract may be void, and he may be entitled to his discharge; but it does not follow that he is to be his own judge, and to discharge himself by desertion.

The case of *Commonwealth v. Gamble*, 11 S. & R. 98, was also cited. In this case the court held the enlistment of an infant in the marine corps valid, but remarked that there was another independent ground upon which he must be remanded, as the recruit was in confinement on a charge of desertion; "that the law is clear that he must abide the sentence of a court-martial before he can contest the validity of the enlistment. There would be an end of all safety if a minor could insinuate himself into an army, and,

after having perhaps jeopardized its very existence by betraying its secrets to the enemy, escape military punishment by claiming the privileges of infancy." And Mr. Justice Brown cited *Ex parte Anderson*, 16 Iowa 595, in which the court refused to inquire into the validity of an enlistment where the recruit was held to answer to a charge of desertion, but remanded him to the military court for trial, and also other cases in which like rulings were made. And he concluded in the case before him (which was the petition of a parent for the discharge of a minor who had enlisted, had deserted, and was awaiting sentence), that the court-martial had jurisdiction of the offence committed by the recruit, and that he must be remanded to await the result of his trial.

<sup>1</sup> *Tyler v. Pomeroy*, 8 Allen 480.

<sup>2</sup> 95 U. S. 209 (see in this connection *McCall v. McDowell*, 16 Fed. Cas. 1235).



by orders emanating from a source which is itself without authority.

There are occasions, said Chief Justice Taney, in *Mitchell v. Harmony*,<sup>1</sup> in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also, where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser. In all these cases, however, the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified. But in deciding upon this necessity, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good.

In *Wilkes v. Dinsman*,<sup>2</sup> the original action was trespass brought by a marine against his commanding officer for injury by punish-

<sup>1</sup> 13 How. 115.

<sup>2</sup> 7 How. 89.

ment for an offence, on a naval exploring expedition. The Supreme Court held as follows:—

“ Especially is it proper, not only that a public officer, situated like the defendant, be invested with a wide discretion, but be upheld in it, when honestly exercising, and not transcending it, as to discipline in such remote places, on such a long and dangerous cruise, among such savage islands and oceans, and with the safety of so many lives, and the respectability and honor of his country’s flag in charge.

“ In such a critical position, his reasons for action, one way or another, are often the fruits of his own observation, and not susceptible of technical proof on his part. No review of his decisions, if within his jurisdiction, is conferred by law on either courts, or juries, or subordinates, and, as this court held in another case, it sometimes happens that ‘ a prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object.’ ‘ While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the fact upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance.’ <sup>1</sup>

“ Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office, however elevated, or however humble the victim.<sup>2</sup>

“ When not offending under such circumstances, his justification does not rest on the general ground of vindicating a trespass in private life, and between those not acting officially and not with a discretion. Because then, acts of violence being first proved, the person using them must go forward next, and show the moderation or justification of the blows used.<sup>3</sup>

<sup>1</sup> 12 Wheat. 30.

<sup>2</sup> 2 Greenleaf on Evidence., Sec. 99.

<sup>3</sup> 2 Carr. & Payne, 158, note; 4 Taunton, 67.

"The chief mistake below was in looking only to such cases as a guide. For the justification rests here on a rule of law entirely different, though well settled, and is, that the acts of a public officer on public matters, within his jurisdiction, and where he has a discretion, are to be presumed legal, till shown by others to be unjustifiable.<sup>1</sup>

"This, too, is not on the principle merely that innocence and doing right are to be presumed, till the contrary is shown.<sup>2</sup> But that the officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or willful oppression, or, in the words of Lord Mansfield, in *Wall v. McNamara*, that he exercised it as 'if the heart is wrong.'<sup>3</sup> In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and willful error.<sup>4</sup>

"It may not be without some benefit, in a case of so much interest as this, to refer a moment further to one or two particular precedents in England and this country, and even in this court, in illustration of the soundness of these positions.

"Thus in *Drewe v. Coulton*,<sup>5</sup> which was an action against the defendant, who was a public returning officer, for refusing a vote, Wilson, J., says: 'This is, in the nature of it, an action for misbehavior by a public officer in his duty. Now, I think that it cannot be called misbehavior unless maliciously and willfully done, and that the action will not lie for a mistake in law.' 'By willful, I understand contrary to a man's own conviction.'

"'In very few instances is an officer answerable for what he does to the best of his judgment in cases where he is compellable to act, but the action lies where the officer has an option whether he will act or no.' See these last cases collected in *Seaman v. Patten*.<sup>6</sup>

<sup>1</sup> *Gidley v. Palmertson*, 7 J. B. Moore, 111; *Vanderheyden v. Young*, 11 Johns. 150; 6 Har. & Johns. 329; *Martin v. Mott*, 12 Wheat. 31.

<sup>2</sup> 1 Greenl. Secs. 35-37.

<sup>3</sup> 2 Carr. & Payne, 158, note.

<sup>4</sup> *Harman v. Tappenden et al.*, 1 East, 562, 565, note.

<sup>5</sup> 1 East, 563, note.

<sup>6</sup> 2 Caines, 313, 315.

“In a case in this country,<sup>1</sup> Spencer, J., says, for the whole court, on a state of facts much like the case in *East*: ‘It would, in our opinion, be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.’ Similar views were again expressed by the same court in the same volume (p. 160), in *Vanderheyden v. Young*. And in a like case, the Supreme Court of New Hampshire recognized a like principle. ‘It is true,’ said the chief justice for the court, ‘that moderators may decide wrongly with the best intentions, and then the party will be without remedy. And so may a court and jury decide wrongly, and then the party will also be without remedy.’ But there is no liability in such case without malice alleged and proved.<sup>2</sup>

“Finally, in this court, like views were expressed, through Justice Story, in *Martin v. Mott*:<sup>3</sup> ‘Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statutes constitute him the sole and exclusive judge of the existence of these facts.’ ‘Every public officer is presumed to act in obedience to his duty, until the contrary is shown.’”

To sum up, then, the following may be given as conclusions of the Supreme Court affecting the military status:—

1. The proceedings and judgments of a court-martial, which has jurisdiction over the person of the defendant and the offence with which he is charged, and which has acted within the scope of its lawful powers, can not be reviewed or controlled by the civil courts.

2. The court-martial is an inferior court of limited jurisdiction, whose judgments may be questioned collaterally. But when it appears that the court-martial has jurisdiction over the person and the offence, and has acted within the scope of its lawful powers, the civil court can proceed no further.

<sup>1</sup> *Jenkins v. Waldron*, 11 Johns. 121.

<sup>3</sup> 12 Wheat. 31.

<sup>2</sup> *Wheeler v. Patterson*, 1 N. Hamp. 90.

3. The court-martial is no part of the judicial system of the United States, but is established and controlled by the rules for the government and regulation of the forces which, by the eighth section of the first article of the constitution, Congress is empowered to make. The constitutional provisions relating to the ordinary trial do not apply to the court-martial.

4. Military officers are protected by law for acts within the limits of their discretion, but for acts beyond their jurisdiction or attended by circumstances showing malice they will be allowed no protection under the color of office.

5. "Whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace by orders emanating from a source which is itself without authority."

6. Enlistment is a contract involving a change of *status*, which can not be thrown off by the soldier at will, even though he be an infant.

7. When a man enters the military service he submits himself to an entirely distinct jurisdiction — the jurisdiction of *military law*; and within this jurisdiction his acts are alone to be measured by the judgment of the courts and authorities belonging to it.

8. State courts have no authority to grant the writ of habeas corpus, when it appears on the application that the person is held under the authority of the United States as an enlisted soldier.

G. NORMAN LIEBER.

WASHINGTON, D. C.

## POWER OF CORPORATIONS TO EXECUTE GUARANTIES.

The doctrine is axiomatic, that the extent to which a corporation is bound by a contract depends, in the first place, upon the proper construction of the statute, whether general or special, which gives it existence as a legal entity, and defines what it may and may not do, and, in the second place, upon the fact, that the contract is necessarily executed by agents, and not by the corporation itself. The operation of these fundamental principles, in the case of a contract having the special characteristics of a guaranty, will be readily comprehended, if we look beneath its external form, and consider what it really means.

All dealings between business men contemplate a transfer of money or of money's worth, and, if one of the parties to a commercial transaction is a corporation having the power to engage in that transaction, it is clearly immaterial whether it settles its obligations in currency, or in something which the other party consents to receive in lieu of currency. Nor can it be of any moment, so long as we confine ourselves to the question of corporate power, whether the settlement is made a condition precedent to the acquisition of the thing which is to pass to the corporation, or is to take place at some future time. Nor will it be seriously contended that, if the settlement is to be postponed, the validity of the arrangement will be affected by the fact that the liability assumed by the corporation is or is not evidenced by a written instrument. It is equally impossible to maintain with any show of reason that, if such an instrument should be executed, the authority of the corporation to execute it in a conditional form, such as a guaranty, is more restricted than its authority to execute it in an absolute form, such as a promissory note or a bond. The incidents of present or future time, of writing or want of writing, of directness or contin-

gency, are mere matters of detail.<sup>1</sup> The essential question is merely whether the corporation has, under the given circumstances, the power to surrender a part of its property for the purpose of obtaining the particular economic advantage which is the object of the transaction. If the charter authorizes it to bargain for that advantage, the manner in which the surrender of its property is effectuated cannot be of any importance whatever. A guaranty, being simply a conditional promise to transfer money at some future time, is obviously valid or invalid, according as a present transfer of money would or would not be lawful.

The conclusion to which the foregoing considerations point is that the rule sometimes laid down to the effect that the guaranty is not within the ordinary scope of the business of corporations<sup>2</sup> has been formulated under a misapprehension of the true nature of the contract. A guaranty is not corporate business in any proper sense of that expression. It is simply a means of arranging for the payment of money in the course of corporate business, and takes its color entirely from the transaction of which it happens to be a subsidiary incident. The business of guarantor corporations is undoubtedly a controlling factor in every case which involves the validity of their guaranties, but the real point to be considered is the business of the particular corporation which executed the guaranty under review, not corporate business in the abstract—the species not the genus. If the business is such that the directors of the guar-

<sup>1</sup> "It is just as lawful," said the court, in a recent New Jersey case, "for a corporation to give a conditional contract to its creditor to pay him money, as it is to give him a contract to pay him directly and without provision. It is the business of the creditor to determine whether he will take the one or the other. Both are equally binding if there is consideration for them. The form of the contract is nothing. The whole question turns on the consideration." *Ellerman v. Chicago & Co.* (1891): 49 N. J. Eq.

217. See p. 247). Compare the statement of a Federal judge to the effect that the form in which railroad companies become parties to obligations issued for construction purposes, whether as makers, guarantors, or indorsers, is of no importance where the authority to contract debts for construction purposes is given in general terms: *Codman v. Vermont & C. R. Co.* (1879), 16 Blatch. 165.

<sup>2</sup> See for example *Brice's Ultra Vires* (Green's Am. Ed., 1880), p. 253.

antor are acting lawfully in carrying it on, they must necessarily have a right to perform all the usual commercial acts which the conduct of the business may demand,<sup>1</sup> and among those acts must certainly be reckoned transfers of corporate assets, whatever shape such transfers may take. Even a guaranty without consideration, though it is not, as we shall see presently, within the scope of the ordinary business of corporations organized for profit, may, under circumstances readily conceivable, be within the implied powers of directors, for it would be wholly illogical to assert that the directors or the executive officers of an eleemosynary corporation may give away a certain sum to an applicant for charity, but may not guaranty his note for the same amount.

Having thus explained what we conceive to be the essential nature of a guaranty, we shall proceed to examine the actual decisions, grouping them with reference to the three following propositions:—

I. A guaranty without consideration is not within the ordinary scope of the business of a corporation organized for profit.

II. A guaranty is valid when it is received as a whole or part of the consideration for something valuable surrendered by another party in the course of a transaction within the charter powers of the guarantor.

III. A guaranty is valid or invalid according as the money raised on the faith of it is or is not to be used in promoting some enterprise which the guarantor is authorized to undertake directly through its own officers.

I. The first of these propositions need not be discussed at any great length, its *rationale* being sufficiently obvious. Everyone dealing with a corporation organized for profit is presumed to know that gratuitous transfers of its property are not a part of its ordinary business, and a guaranty without consideration is, of course, no exception to this rule. The general principle obtains, therefore, that a guaranty of this description is *ultra vires* the

<sup>1</sup> *Beveridge v. New York &c. R. Co.* (1889), 112 N. Y. 1.



directors of any such corporation,<sup>1</sup> the only cases in which this principle does not operate, being those in which the special policy of the commercial law, excludes all inquiry as to whether any consideration has passed,— that is to say, where the obligation guaranteed is a negotiable instrument, and it has passed into the hands of a *bona fide* purchaser for value.<sup>2</sup>

In determining the rights of a *bona fide* purchaser of guaranteed bonds, the guaranty will be treated as if executed at the time of the purchase, where there is nothing to show that the guaranty was not taken as a part of the consideration.<sup>3</sup> Therefore, even if a guaranty was originally *ultra vires* the directors, as being without consideration, the corporation cannot deny its liability on this ground, where the instruments guaranteed are accepted by a third person, partly upon the strength of the guaranty, in payment of a claim which he has against the guarantor. Under such circumstances there is a renewal of the guaranty upon sufficient consideration and it is quite immaterial that the true consideration is not mentioned, since parol evidence is always admissible on this point.<sup>4</sup>

Whether a guaranty is supported by a consideration must

<sup>1</sup> *Genesee Bank v. Patchin Bank*, 13 N. Y. 309, followed in *Marford v. Farmers' Bank*, 26 Barb. 568 (1857); *Bank of Genesee v. Empire Stone Dressing Co.*, 26 Barb. 33 (1857); *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barb. 42 (1859). *S. P. Hall v. Auburn Tpke. Co.* (1865), 27 Cal. 255; *Nat. Park Bank v. German &c. Co.* (1889), 116 N. Y. 281; *West St. Louis Bank v. Shawnee Co. Bank* (1877), 95 U. S. 557; *Aetna Nat. Bank v. Charter Oak &c. Co.* (1882), 50 Conn. 167; *Culver v. Reno Real Estate Co.* (1879), 91 Pa. 367; *National Bank v. Atkinson* (1893), 55 Fed. Rep. 465.

<sup>2</sup> *Monument Nat. Bank v. Globe Works* (1869), 101 Mass. 57; *Credit Co. v. Howe* (1886), 54 Conn. 357; *Farmers' &c. Bank v. Empire Stone Dressing Co.*, 5 Bosw. 275; *Mechanics Banking Assoc. v. White Lead Co.*

(1886), 85 N. Y. 505; *National Bank v. Young* (1886), 41 N. J. Eq. 531; *Bank of Genesee v. Patchin Bank* (1855), 13 N. Y. 309; *City Bank v. Empire Stone Dressing Co.* (1859), 30 Barb. 421; *Madison &c. R. Co. v. Norwich Sav. Soc.* (1865), 24 Ind. 457. In *Farmers' Nat. Bank v. Sutton Mfg. Co.* (1892), 52 Fed. Rep. 191, it was held that the Michigan Statute, (How. Am. Stat. c. 124), providing that it shall be unlawful "to divert the operations or to appropriate the funds of a corporation to purposes not set forth in the articles of the association," leaves the law as it was, a *bona fide* purchaser of accommodation paper being still entitled to recover on it.

<sup>3</sup> *Rogers &c. Works v. Southern R. R. Assoc.* (1888), 34 Fed. Rep. 278.

<sup>4</sup> *Amot v. Erie Ry. Co.* (1876), 67 N. Y. 315.

be determined by ordinary principles as applied to the special circumstances under which corporate guaranties are usually given. The only question under this head is whether, as a result of the expenditure of the money obtained through the guaranty, the corporate business will receive a direct benefit.<sup>1</sup>

II. The second of our propositions is illustrated by rulings to the effect that a railway company authorized to accept a lease of another road has an implied authority to arrange for paying rent, and, as one of the ways in which such payment may be effected, can pay, or guaranty the payment of the interest on the lessor's coupon bonds;<sup>2</sup> and that a guaranty is valid where it is given as a part of the consideration of a contract of purchase, which embraces, among other things, the property subject to the mortgage by which the bonds are secured.<sup>3</sup>

If the obligations guarantied are to the property of the guarantor corporation at the time the main transaction is consummated, there is an additional reason why the guaranty should be held valid, for the right to employ the usual means of disposition is a necessary complement to the right of acquisition. It is accordingly held that the power of the corporation to give currency by a guaranty to any instruments of which it is the owner

<sup>1</sup> Connecticut &c. Ins. Co. v. Cleveland &c. R. Co. (1868), 41 Barb. 9 (expectation of increased profits consequent on a change of gauge which the company whose bonds were guarantied was enabled to effect by means of the money raised on the faith of the guaranty, a sufficient consideration to support such guaranty): Harrison v. Union Pac. Ry. Co. (1882), 13 Fed. Rep. 522 (fact that another company's line, when constructed, will become a feeder of guarantors, a sufficient consideration for guaranteeing its bonds to enable it to raise money for the construction); Stark Bank v. U. S. Pottery Co. (1860), 34 Vt. 144 (guaranty of another party's obligations, given for the purpose of

saving the guarantor's own credit and enabling it to go on with its business is supported by a sufficient consideration). The mere *executive* officers, however, have no power to bind the corporation by a guaranty executed to induce the payee of the notes of a partnership whose property the corporation has taken over to refrain from enforcing his claim by a levy on that property: Dobson v. Moore (1895), 62 Ill. 487.

<sup>2</sup> Eastern Tp. Bank v. St. Johnsbury &c. R. Co. (1889), 40 Fed. Rep. 428; Low v. Central Pac. R. Co. (1877), 52 Cal. 53; 9 Am. Rep. 366.

<sup>3</sup> Ellerman v. Chicago &c. Co. (1891), 49 N. J. Eq. 217.

is as complete as that of an individual.<sup>1</sup> The transaction is treated as if the company should say to its creditor: "Here are our bonds, and here is our guaranty; take them in satisfaction of your claims."<sup>2</sup>

III. The decisions bearing upon the third proposition will be more clearly understood, if it is remembered that the rule which forbids a corporation to do any business except that for which it is organized is a product of three distinct principles which may be thus stated: (1) The charter creates certain statutory obligations as between the commonwealth and the corporation. (2) The charter shows the precise risks to which persons who subscribe to the stock will be exposed. (3) The charter indicates to parties dealing with the corporation the character and extent of the operations which it is entitled to carry on, and enables them to form a judgment as to hazards they will run in giving it credit.

In view of the extremely liberal legislation of modern times in regard to the creation of corporations, the technical right of the commonwealth to treat a usurpation of power as a breach of contract, punishable by forfeiture, possesses a much smaller significance than was formerly the case. Prominence is now given rather to the idea that anything done in excess of the authority conferred by the charter is a violation of a statute, and should therefore entail the usual consequences of illegality. To shareholders and outside parties the declaration of the State

<sup>1</sup> *Bank of Genesee v. Patchen Bank* (1855), 18 N. Y. 809; *Madison &c. R. Co. v. Norwich Sav. Soc.* (1865), 24 Ind. 457; *Arnot v. Erie Ry. Co.* (1876), 67 N. Y. 315; *Atchison &c. R. Co. v. Fletcher* (1886), 35 Kan. 236; 24 Am. & Eng. R. Cas. 234; *Rogers &c. Works v. Southern R. Assoc.* (1888), 34 Fed. Rep. 278; *Marbury v. Kentucky Union Land Co.* (1894), 62 Fed. Rep. 335; *In re West of England Bank* (1880), 14 Ch. Div. L. R. 817. Compare *Bonner v. City of New Orleans*, 2 Woods 135, where a railroad company having transferred by indorsement a munic-

ipal bond issued to it as payee, was held bound as indorser upon the default of the obligor. See also *Olcott v. Tloga R. Co.*, 27 N. Y. 546. It has been strongly intimated, though not in terms decided, that an insurance company having no special powers cannot assume, as principal debtor, the payment of the interest on railroad bonds held by it as collateral security for a debt due to it from the obligor: *Aetna Nat. Bank v. Charter Oak &c. Ins. Co.* (1882), 50 Conn. 167.

<sup>2</sup> *Arnot v. Erie Ry. Co.* (1876), 67 N. Y. 315, per Earle, J.

is, that contracts entered into in regard to business which a corporation is not authorized to do, shall be dealt with by courts as contracts prohibited by law,—incapable of enforcement, as long as they are executory, and preventable by injunction, if a stockholder thinks fit to ask for such relief. In other words the most salutary function and operation of the doctrine of *ultra vires* is not that it enables the State to compel corporations to keep the obligations owed to itself, but that it may be so applied as to furnish protection to those who, like stockholders, have invested their money directly in the corporate business, or those who, like creditors, have surrendered something of value to aid in carrying on that business. Considered from this point of view, the doctrine rises to the dignity of a great principle of public policy, and makes good a clear title to recognition, even at a time when the currents of legislation are setting so strongly in a direction which is carrying us further and further from the old common-law conceptions of a corporation.

The theory thus stated has the very important advantage of enabling us to place upon a perfectly rational basis a rule which has been a good deal criticised, and has been a stumbling-block to various judges and text-writers, viz, that the acquiescence of the whole body of stockholders cannot impart validity to an *ultra vires* contract. Plainly the stockholders are not the only persons to be considered. Whatever may be their own ideas of expediency, they have no right to jeopardize the interests of third parties who have a right to assume that the constating instruments indicate precisely the nature of the risks to which the corporate capital is exposed. So far as regards persons dealing with a corporation, therefore, the rule that even the unanimous consent of the corporators will not give vitality to an *ultra vires* contract, is merely a special illustration of the stern disapproval with which the law always visits any conduct, whether of individuals or corporations, which induces another party to give up something of value in a case in which he would have declined to do so, if he had comprehended fully the true situation.

The foregoing reasons for insisting strictly on the due observance of the provisions of corporate charters have not, so far as we know, been formally stated by any court. But the impor-

tance of that principle of public policy which demands that the property of stockholders and creditors shall not be exposed to any greater risks than those implied by the terms of the constituting instruments, has been fully recognized, as regards stockholders, in the well-known case of *Coleman v. Eastern Counties Ry. Co.*,<sup>1</sup> and, as regards both stockholders and creditors, in two recent cases in the Federal Court of Appeals.<sup>2</sup>

Three distinct sets of facts are conceivable in which the use which is to be made of the money procured through a guaranty is the essential point to be considered in determining its validity. The money may be spent either (1) in furthering the business of the guarantor itself; or (2) in furthering a business which the corporation is authorized to carry on; or (3) in furthering a business which the guarantor was not authorized to carry on. In the two first cases the guaranty is valid and enforceable, in the third it is not.

(1) The question whether a guaranty of another party's obligation, issued to raise money which is to be spent in carrying on the business of the guarantor itself, is valid, clearly admits of but one answer; for to deny the validity in such a case is equivalent to denying the power of the corporation to do indirectly what it has the power to do directly, or, slightly to change the point of view, to deny it the power to lessen its responsibility by throwing a part of it on some one else. Accordingly it has been held that a railroad company, which is authorized to issue its own bonds for the purpose of procuring money to construct its road, may guaranty the aid-bonds received by them from municipalities, and put upon the market to raise money for the same purpose.<sup>3</sup> So also, under a general authority to issue bonds for construction purposes, a company may lawfully guaranty the payment of notes issued for that purpose by the trustees and managers, appointed in proceedings to enforce a mortgage upon all the property of a company to which the guarantor has leased its road in perpetuity.<sup>4</sup>

<sup>1</sup> (1846) 10 Beav. 1.

<sup>3</sup> *Railroad Co. v. Howard* (1868), 7

<sup>2</sup> *Marbury v. Tod* (1894), 62 Fed. Rep. 335; *Humboldt Mining Co. v. Variety Iron Works* (1894), 62 Fed. Rep. 356.

Wall. 392.

<sup>4</sup> *Godman v. Vermont &c. R. Co.*, 16 Blatch. 165 (1879).

(2) It is plain that neither stockholders nor creditors have any ground for objecting, on the score of an increase of risk, to the incurring of obligations to promote the success of a business which, although it is to be under the immediate management of other parties, might without any overstepping of the charter powers, have been carried on by the corporation itself. Hence a railroad company empowered "to build, construct, and run, as a part of their corporate property, such number of steamboats or vessels, as they may deem necessary to facilitate its business operations," has, by implication, the power to employ steamboats belonging to others in connection with its own business, under an agreement by which it guaranties to the proprietors of the boats that the gross earnings shall not fall below a certain sum. The ground of this doctrine is that the power to secure steamboat connection by the guaranty is of the same character as that of owning and running a steamboat, and involves less responsibility, and risk of loss for the railroad company.<sup>1</sup> Upon the same principle, it has been laid down by the New York Court of Appeals, in the course of its opinion in a recent case, that a corporation which deals in manufactured goods of a certain description, and has not a sufficient quantity on hand to fill its orders, may, as a proper incident of its business, extend financial aid to a manufacturer by advancing him money to enable him to increase his output of the goods needed, and that this aid may be given by a direct loan of money, or by taking the notes of the manufacturer and by its credit raising money thereon.<sup>2</sup> So where the cheapest and best method of procuring lumber for the purpose of carrying on a saw mill is to build a railroad penetrating the country where the lumber is to be cut, the saw mill company may clearly build the line itself, and having that power, it may guaranty the bonds of a company which undertakes to build the road.<sup>3</sup>

Upon principles analogous to those applied in the cases just cited must be upheld, if at all, the opinion of the Iowa Supreme

<sup>1</sup> *Green Bay &c. Co. v. Union S. Co.*, 107 U. S. 98.

<sup>2</sup> *Mercantile T. Co. v. Kiser* (1893), 91 Ga. 636.

<sup>3</sup> *Holmes v. Willard* (1890), 125 N. Y. 75.

Court that an agricultural society may guaranty the notes of a street railway company, organized to build a road which will facilitate access to the annual fairs held by such society.<sup>1</sup>

A decision which lies on the border line between the cases cited in this and the following sections is to the effect that a railroad company with the ordinary powers of such companies cannot guaranty that the subscribers to stock of an elevator company shall receive a certain percentage of dividends.<sup>2</sup> We venture to think that the rule thus laid down is somewhat too sweeping. The case of *Davis v. Old Colony R. Co.*,<sup>3</sup> cited by the court, as a conclusive authority, related to a guaranty of a business wholly foreign to that of the guarantor,<sup>4</sup> and the analogy is therefore imperfect. The admission of the court that a railroad company may build elevators for its own use is sufficient of itself to indicate what a very sharp line of distinction there is between the two cases. The true doctrine, it is submitted, is that a railroad company may guaranty the success of the elevator company, if the latter is, in a *bona fide* sense, to be an auxiliary concern which is to be separately carried on merely as a matter of convenience, and that the bare fact of the elevator company's accepting custom from other persons besides the guarantor, should not have the effect of invalidating the arrangement. That this was really the position which the court intended to take up may perhaps be surmised from the stress which was laid on the circumstance that the agreement contained no provision which bound the railroad company to use the elevator,

<sup>1</sup> *Thompson v. Lambert* (1876), 44 Iowa, 239. It is to be observed, however, that this point was not actually involved in the case, as the suit was brought by a stockholder to enjoin the foreclosure of a mortgage securing certain notes, the proceeds of which had been spent by the society, and the court very properly refused to apply the doctrine of *ultra vires* to invalidate an executed contract. It should also be noted that the ruling was made with direct reference to the very liberal

enabling provision of the Iowa Statute, by which corporations may "make contracts, acquire and transfer property, possessing the same power in such respects as private individuals now enjoy" (Iowa Code, 1851, §§ 674, 708; Revised Code, §§ 1151, 1187).

<sup>2</sup> *Elevator Co. v. Memphis & C. R. Co.* (1887), 85 Tenn. 703.

<sup>3</sup> (1881) 131 Mass. 258.

<sup>4</sup> See note 2, *post*, p. 373.

and that it was not important to the owners whether it was issued or not.

(3) In dealing with that class of cases in which it is conceded that the business which the guarantor corporation has attempted to aid is wholly foreign to its own, the courts have uniformly declined, in the absence of some express grant of power which modifies common law principles, to uphold the guaranty, even when there is a probability, or even a practical certainty, that the profits derived by the guarantor from its own business will be augmented as a result of the success of the outside enterprise. No other rule, it is evident, could possibly be laid down without shattering the foundation upon which, as has already been shown, the doctrine of *ultra vires* in such cases reposes. The stockholders and the creditors both have a right to say that this was not the quarter from which they expected the money to come which would furnish dividends and pay debts.

The earliest case in which these principles were elaborated was *Coleman v. Eastern Counties Ry. Co.*,<sup>1</sup> where a contract by which the directors of a railway company undertook to guaranty a five per cent dividend on the stock of a steamship company, the operations of which, it was alleged, would augment the traffic on the railway, was declared invalid at the instance of a stockholder. Upon precisely the same grounds it has been ruled by the Supreme Court of Massachusetts, in a well-known decision, that, as the holding of a "World's Peace Jubilee and International Musical Festival" is an enterprise wholly outside the objects for which railroad and manufacturing companies are established, such companies cannot guaranty the expenses of the festival, although it will have a favorable effect on their profits, in the one case, by increasing passenger travel, in the other, by creating a more active demand for the articles manufactured.<sup>2</sup> So it is an excess of power for one plank-road com-

<sup>1</sup> (1846) 10 Beav. 1.

<sup>2</sup> *Davis v. Old Colony R. Co.* (1881), 181 Mass. 258. Somewhat similar in principle is the recent case of *Tompkinson v. Ry. Co.* (1887), 56 L.

T. Rep. 812, where a stockholder of a railway company obtained an injunction against the carrying out of a resolution, passed at a general meeting, to contribute a sum of money



pany to guaranty a loan made to another to enable the latter to construct a road which is expected to be advantageous to the guarantor;<sup>1</sup> and for a company organized to manufacture iron-work for mines to guaranty the performance of the contract of a manufacturing company for the erection of a mineral mining plant, although the object of the guaranty is to secure a customer for its own wares.<sup>2</sup> So a company organized "for the purpose of manufacturing and dealing in all kinds of brass, copper, and German silver goods," cannot, under the pretense of fostering its business, engage in a transaction so entirely foreign to that business as dealing in carbons. An indorsement of the note of a company, from whom the carbons are procured, in order to enable it to increase its plant and facilities, is entirely *ultra vires* and void.<sup>3</sup> So the fact that a customer of a transportation company will have more business to give it if he can procure credit to make purchases from a brewing company, will not justify the secretary of the former company in guaranteeing that the purchases made shall be duly paid for. Such a guaranty, it was declared, was certainly *ultra vires* the secretary, if not *ultra vires* the corporation.<sup>4</sup> So a guaranty of a hotel-keeper's rent by a brewing company is not rendered valid by the fact that the hotel-keeper has promised to buy his beer from the guarantor.<sup>5</sup>

towards the promotion of a public institution, the only ground suggested for the donation being that there would be a larger number of passengers seeking transportation on the railway, when the institution should be opened. The abstract question, whether a street railway company had power to give subscriptions in aid of an agricultural exhibition, was raised, but not discussed, in *State Board &c. v. Citizens' &c. Ry. Co.* (1874), 47 Ind. 407, the court relying on the distinction between executed and executory contracts in cases where there is no express statutory prohibition, but merely an alleged defect of power.

<sup>1</sup> *Madison &c. Plank Road Co. v. Watertown &c. Plank Road Co.* (1859), 7 Wis. 58.

<sup>2</sup> *Humboldt Mining Co. v. Variety Iron Works Co.* (1894), 62 Fed. Rep. 356.

<sup>3</sup> *Holmes v. Willard* (1890), 125 N. Y. 75.

<sup>4</sup> *Lucas v. White Lime Co.* (1886), 70 Iowa, 541.

<sup>5</sup> *Filon v. Miller Brewing Co.*, 15 N. Y. Supp. 57. The court took the ground that whether an act is within the corporate powers depends upon the character of the act, and not upon the consideration for which it is performed; that the company was to derive no benefit from the lease through the use and occupation of the demised premises; and that the fact of the tenant's engaging himself to buy the article manufactured by the company gave it no more interest in the lease than if it was to

Under this head we may perhaps also place the ruling of a Canadian court to the effect that a bank cannot guaranty the payment by a customer of the hire of a steamer under a charter-party;<sup>1</sup> but the principle of the decision is obscure, as the court does not state the reasons for denying the existence of the power; nor are any authorities cited. The fact that the object of the guaranty might have been attained equally well by allowing an overdraft — an accommodation which is apparently conceded to be within the competence of the directors of a bank<sup>2</sup> — suggests some doubts as to whether the court has not laid too much stress upon the mere form of the transaction.

In all the cases cited so far the existence of a power to guaranty the obligations of other parties has been conceded or denied without any reference to positive statutable authority in that regard. A few rulings remain to be noticed which are governed by a more or less explicit declaration of the will of some legislative body.

A company which is authorized in general terms to aid another "by means of subscription to its capital stock, or otherwise" may furnish the aid by means of a guaranty of the bonds of the second company.<sup>3</sup> So the power of one company to guaranty

receive a money consideration for becoming surety for the rent. This decision of the Supreme Court seems to be impossible to reconcile with a ruling of the New York Court of Common Pleas to the effect that a brewing company was not exceeding its powers, *under the circumstances*, in guaranteeing a lease of premises occupied by one of its customers, and containing fixtures mortgaged to it: *Field v. Burr Brewing Co.* (1892), 18 N. Y. Supp. 456. No reasons whatever are given for the decision, and the learned judge, with a rather tantalizing coyness, declined to respond to counsel's invitation to lay down a general rule as to this class of guaranty. Whether the

ruling depends upon the interest in the premises which the mortgage gave the guarantor, or upon the fact that such arrangements were regarded as a way of disposing of the article manufactured by the brewing company which made the customer virtually an agent, and the guaranty a direct obligation of the company, can be only conjectured.

<sup>1</sup> *Johnson v. Chaplin* (1889), Montreal L. Rep., 6 Q. B. 111.

<sup>2</sup> See *Morse on Banks*, §§ 357, 358.

<sup>3</sup> *Connecticut Mut. L. Ins. Co. v. Cleveland & C. R. Co.* (1868), 41 Barb. 9. An ordinance authorizing a contract with a gas company, and the issue to it of the bonds of the city,

the bonds of another is necessarily implied where the charter of the former authorizes it to effect a temporary or permanent consolidation with the latter. Such a grant of power virtually amounts to a permission to risk the guarantor's whole capital in another business, and, *a fortiori*, it may put a part of it at hazard.<sup>1</sup>

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and providing that the company shall "guaranty the said bonds and assume the payment of the principal thereof at maturity," implies that the company is to guaranty not only the principal, but the interest also. Such an ordinance contemplates two undertakings by the company, one for the security of the bondholder, viz., to answer for the city's liability, the other for the security of the city, viz., to provide for the payment of the principal of the bonds at their maturity. Such being the construction of the guaranty, an indorsement by the president on the bonds guarantying the payment of the "principal and interest," is properly within the scope of his authority, as it only declares in terms what would have been implied from a simple guaranty of the bonds. *New Orleans v. Clark* (1877), 95 U. S. 644.

<sup>1</sup> *Marbury v. Tod* (C. C. A. 1894), 62 Fed. Rep. 335. Compare *Tonawanda Valley & C. R. Co. v. New York & C. R. Co.* (1886), 4 N. Y. St. Rep.

744 (N. Y. Supr. Ct.), where, in view of the existence of a statute of the kind which has probably been enacted in every State, allowing the consolidation of railway companies owning connecting lines, it was held that, there was no question but that contracts between railway companies for the arrangement of their mutual traffic, may lawfully be made, and that, as incident to such contracts, one company may bind itself to pay stipulated sums, or assume obligations to pay interest on the bonds of the other. Compare the decision in *Smead v. Indianapolis & C. R. Co.*, 11 Ind. 104, where a railroad company empowered to make such contracts with a company owning a connecting road for the transportation of freight and passengers, as the board of directors might think proper, was held to have power to give its bills and notes to the second company to enable it to raise money for the purpose of changing the gauge of its road.

## INTERVENTIONS IN THE FEDERAL COURTS.

A practice has grown up in the United States circuit courts, during the last thirty or forty years, in the consideration of motions, or what are called intervening petitions, at the instance of strangers to pending litigation. The purpose is to adjudicate rights, claims, liens or charges preferred by such intervenors in respect of property controlled by the court in the course of the suit. These interventions are entertained for a great number of objects and constitute a large part of the litigated business pertaining to railroad foreclosures and suits of analogous character. They are not, however, confined to proceedings in equity, but apply as well to matters of which the court has jurisdiction upon the law side of the court. Nor are they restricted to what appears to be pending litigation, but may have application to matters which are apparently already adjudicated and past consideration so far as the immediate parties to the litigation are concerned. The determination of matters of this sort is frequently called for and often involves the most important interests. It is, therefore, of great moment to determine upon what theory they are to be considered as within the jurisdictional powers of the Federal courts, and to what extent they involve matters which those courts can or ought to adjudicate.

Except for a careful investigation of the origin of these proceedings, it might be supposed that they were entertained by the Federal courts in pursuance of a broad equitable jurisdiction which requires, according to the fundamental principles of equity, a full and complete determination of any matter of controversy which the court has in hand, although such determination may demand the presence of persons other than those who are the immediate litigants, and may involve the settlement of other issues than those originally presented. It will be found, however, that the doctrines of equity are not, generally speaking, broad enough to permit the extensive jurisdiction exercised by

the courts in this respect; for it is a principle of equity that no stranger to a suit has any right to an adjudication in that cause of interests claimed by him to be, in any manner, paramount to those of the primary parties. If the original proceeding can be made a subject of a proper decree, the complainant is not to be burdened with other issues or considerations respecting the subject-matter. The rights of third persons, not parties to the suit, are not interfered with by the decree, and can be made the subject of independent proceedings in equity, or at law, according to the nature of the rights. And the Federal courts themselves have gone so far in this respect as to deny to persons who claim to be interested in a subject-matter in the hands of the officers of the Federal courts the privilege of being made defendants where they have no interest in the immediate controversy raised by the bill and answer. Manifestly, therefore, some more substantial or tenable ground for the jurisdiction must be found than the general powers of courts of equity.

This other and different basis for the determination of claims of strangers to the suit lies in the general principle that no court, sitting either in equity or as a common law tribunal, can afford to permit its judgment, decree or process to do injustice, or to be abused for the interest of persons who may desire that result. And in connection with this there is the proposition, well maintained in the Federal courts, that where such courts through their officers have impounded or taken possession of real or personal property, for the purpose of making some disposition of that property at the instance of parties to pending litigation, they cannot permit, for any purpose whatsoever, that property to be affected, interfered with or taken away from the custodianship of the officers of the court, for the protection of any rights which are sought to be enforced outside of the tribunal which has taken control of the property. This latter principle is far-reaching in its effect. It has been regarded as necessary to the integrity of the Federal courts, exercising as they do a concurrent jurisdiction with the State courts, so far as territory is concerned, and in many respects, as to the subject-matter of the suit. Therefore it is universally held that persons who may willfully interfere with the possession or control of property

impounded by the court are in contempt and may be punished for their actions. The State courts have no power by their writs to interfere with the possession of the United States marshal, nor with the possession and complete control of property of a receiver appointed by the United States court. The doctrine is maintained in its integrity and to the logical result that all such proceedings pressed by persons otherwise entitled to remedies in the State courts, are void, when exercised or attempted while the property is in the custody of the law, that is to say, in the control of the courts of the United States. So far has the principle been carried that Justice Matthews of the Supreme Court of the United States has said that it is the mere physical custody of the marshal of the court under the color of his authority which makes it incumbent upon the United States court to entertain applications of persons who may have rights in and about the subject-matter, and to give them full, complete and adequate remedies in the United States courts. Justice Matthews states that this is a logical consequence, for if the United States courts have assumed the position that the property in the hands of the officers of the court cannot be interfered with in any way, common justice requires that persons who have or claim rights in respect of such property should have a tribunal in which their rights or claims can be heard and determined. Thus in the case under his consideration,<sup>1</sup> it was held that a citizen of Louisiana who claimed a statutory charge upon property held by the United States marshal under a writ ultimately found by the court to be invalid, could intervene in the Federal court and have his rights fully enforced there, the State court having no power to proceed against property held by the marshal *virtute officii*. This jurisdiction which the United States courts have assumed is ancillary and auxiliary to the primary jurisdiction conferred by the proper institution of the original suit.

Upon these two fundamental principles the law respecting intervening petitions has been founded and developed. In the cases where such petitions were entertained, the courts found an analogy in an ancient proceeding permitted by courts of chancery

<sup>1</sup> Gumbel v. Pitkin, 124 U. S. 131.

and mentioned by Daniel and other authors upon chancery practice. This was called an examination or petition *pro interesse suo*, directed or considered at the instance of a stranger to the litigation for the purpose of advising the court that its decree of sequestration about to be entered or already entered, would have, if given its full and natural force, the effect of depriving the petitioner or third person of some right or interest and do him an injustice which the court ought not to permit. Whereupon with the consent or against the opposition of the primary parties to the suit, the Chancery Court would direct the delivery of the property or so modify the decree that the interests of the third person or petitioner might not be affected thereby. But the Federal courts have long since departed from the original or primary scope of such an inquiry in equity, or have broadened its effect so that such a petition is entertained for many purposes not originally contemplated; and now allow such proceedings at law as well as in causes in equity. It was, therefore, speedily held that where in proceedings at law the marshal of the court under attachment or execution had seized property, a claimant of that property could present his petition and have his rights determined as upon interplea; in analogy with interpleas permitted by statute. So also he might bring what would ordinarily be called an original bill in equity to avoid the judgment itself for collusion or fraud or to restrain its enforcement, and such bill in equity will be regarded by the court as ancillary to the original suit and judgment, and not dependent upon conditions which might be required to give the court original or initial jurisdiction. In other words, the court will treat such a bill as the equivalent of an intervening petition or motion *pro interesse suo* and adjudicate the claimant's rights, because of the abuse of the process of the court which might otherwise result in the disposition of the property in the marshal's hands. When railroad foreclosure suits, under elaborately constructed mortgages, became common, the Federal courts found in the consideration of intervening petitions the most convenient and efficient method of settling and adjusting the rights and claims of the many persons who might be affected by the final decree of foreclosure accorded to the prayer of the mortgagees. It is in this class of cases

that the consideration of intervening petitions has been most frequent. They are also common in admiralty suits, where, perhaps, the jurisdiction was still more ancient, but founded upon the same general or fundamental principles.

It will be seen at once that as this jurisdiction assumed by the Federal courts is regarded as ancillary, intervening petitions can be presented by citizens of the same State as either of the principal parties to the suit. The intervention does not necessarily have the qualities of an original suit. It is drawn to the principal case by the jurisdiction of the court settled in the principal issue. Nor is it necessary that the amount involved should be in excess of the statutory limit of \$2,000. An intervention will be entertained for a less sum. And the primary jurisdiction given by the proper institution of the original suit, and the custodianship of the property by the officers of the court will even permit of the complete foreclosure of a mortgage prior in right to the claim of the plaintiff, and differing in character from the original cause of action, notwithstanding that such foreclosure could not have been had as an original proceeding in the Federal court, *i. e.*, for lack of diverse citizenship. In other words, all questions which may involve the application or disposition of the subject-matter which the court has in hand are drawn to the Federal courts as an incident of its original jurisdiction and its rightful possession and control of the property.

The development of the law relating to intervening petitions in the Federal courts is of such late date that no text-writers have ever made it the subject of independent treatises. Nor has any effort been made to subdivide or classify the different kinds of interventions which have to be treated by the Federal courts. For convenience sake the following may serve as such a subdivision or classification.

The interventions of strangers to the original cause which will be entertained and adjudicated by the Federal courts may have as the basis of their institution one of the following matters of interest:—

1. They may be based upon a right or title to the subject-matter paramount in quality to the claims of the original parties to the suit and extending to the whole matter of rightful ownership.



Into this class of interventions will fall almost all those proceedings which are permitted by the Federal courts as incidental to suits at law ; and they are closely analogous to the ordinary interpleas permitted by statute and in the State courts. Where it is practical to do so, the intervention is often permitted on the ground of the statutory right. In this class also should fall those proceedings, apparently equitable in their general nature, where the judgment of the Federal court at law has been obtained by collusion or fraud, and the intervention is filed for the purpose of protecting a right or title of the intervenor which ordinarily would be enforceable at law. To this class of cases may also be referred the permission which may be granted to a trustee in a deed of trust after default to exercise a power of sale of the subject-matter.

2. In the second class of interventions may be placed those which are based upon some statutory or contractual lien which the intervenor has by law, independent of the peculiar jurisdiction of the Federal court, and which he seeks to impose upon the property in the charge of the court and to enforce in the Federal court because of his inability to pursue the same right or remedy in the State courts. Into this class of interventions fall the enforcement of statutory or mechanics' liens, charges or liens which may be the result of private contract between the parties, and also judgment liens of later or earlier date obtained in the State courts and which by State statute are made precedent in right to the complainant's cause of action. In all these cases the Federal courts recognize fully the force of State law and give to intervenors who have brought themselves within the provisions of the State statutes, or are clearly within the terms of their contractual rights, the opportunity to impress the property or fund in the hands of the court with their liens or charges as superior in right to the principal parties to the suit. The court in this class of cases, however, does not undertake to surrender the subject-matter of the litigation to the intervenor, because of his superior claim or preference, but refers his charge, claim or lien to the proceeds of the sale or disposition of the property, undertaking to enforce the rights of the principal parties to the suit in their entirety, simply deferring them in

such respects as may be necessary to do full justice to the intervening claimant. This class of interventions will also include the cases where the intervention is for the purpose of foreclosing or enforcing a prior mortgage or deed of trust, the court proceeding with such an intervention as if it were the principal suit, neglecting thereafter the claims of the original parties to the case, except so far as they can be impressed upon the surplus, if any, which may arise after a sale.

3. The third class of interventions consists of those which are based, not upon rights or titles in the subject-matter existing in full force by law, irrespective of the action of the Federal tribunal, but such as rest upon equities which are purely the creation of the Federal courts and which in the judgment of such courts justify the preference of the interveners, owing to such equities, over the rights of the parties to the suit. It is believed that the interventions which are now referred to are peculiar to railroad foreclosures. It has been held that they are inapplicable to any other cases in which the court has taken property into its possession. They have been denied in admiralty proceedings. They rest mainly upon the theory of a diversion of funds and the public nature of the business of operating railroads. The principle was first authoritatively enunciated in the case of *Fosdick v. Schall*,<sup>1</sup> and is familiar to every one as that which takes from the mortgagees or bondholders of a railroad who are seeking to enforce their contractual lien upon the property the proceeds of the sale or disposition thereof, or the earnings pending the suit, to pay for such operating expenses of the road as ought to have been paid out of the current earnings prior to the institution of the suit. The courts hold that as railroads are affected with a public interest and must be carried on and operated, the current incomes are pledged to the current operating expenses, and if, therefore, the current incomes are in fact used for permanent and valuable improvements or the payment of interest upon the bonded indebtedness, such payments must be restored or taken out of the property itself, for the purpose of liquidating any unpaid and neglected current bills, which have

<sup>1</sup> 99 U. S. 235.

for a short time prior to the institution of the suit been incurred, or falling due. This is a cloudy sort of doctrine and came to be speedily restricted in its operation. It resulted in what is called the six months' rule or an arbitrary proposition that the current expenses, which the court will require to be paid out of the property in its hands, must be for supplies or materials furnished within six months prior to the inception of the foreclosure suit. There is no special virtue apparent in six months, but simply the necessity of drawing an arbitrary line somewhere. The later authorities have drawn away from this position, preferring to adopt a reasonable time under the circumstances of each case. And the doctrine is applicable solely to operating expenses and permanent improvements. The rental of a leased railroad, for instance, does not fall within this head, neither do counsel fees or the salaries of its corporation officers. As an additional ground to fortify the court in entertaining this class of interventions, it is said that the appointment of the receiver in the first instance is discretionary and that the court is at liberty to insist upon the payment of these claims as a condition which is equitable and just prior to its granting to complainants the relief they ask. Some of our Federal judges have seized hold of this view of the law as a reason for requiring from the bondholders or trustee undertaking to enforce a deed of trust for foreclosure an agreement that claims of whatever date, unsecured and payable to the citizens of the States through which the road runs, should be paid. This, of course, gives to unsecured creditors a preference over the contractual lien. The Supreme Court of the United States has condemned this practice. And it is manifest that any such doctrine as this, well established as it is within its limitations, may be made the subject of abuse and great wrong. It is too closely analogous to the theory that justice and equity is to be measured by the length of the chancellor's foot.

Interventions of this class result in an order or decree in each instance requiring the Master in Chancery, or the receiver, to pay to the intervenor the amount of his claim out of the proceeds of sale or incomes of the property in preference to the complainants. The court generally provides that the costs of

the suit and the compensation of the receiver and of counsel in the cause shall be precedent in right.

4. The fourth class includes those interventions which rest upon legal rights or equitable liens upon the subject-matter in the hands of the court, but which are deferred in law or equity to the rights of the complainant. They may be superior to the rights of other parties to the suit. Manifestly these interventions, though they may be adjudicated, have no effect to postpone or interfere with the original purpose of the suit. They apply simply to any possible surplus which may be in the hands of the officers of the court after the objects of the original suit have been effected. They are then classified among themselves, but are made liens or charges only upon the remnant of the property which may be in the hands of the court. There usually is no remnant, and such interventions are, therefore, ordinarily of little importance. The right of the court to adjudicate them is based upon the conclusion that they are liens or charges, contractual or statutory. If they are merely open accounts, obligations *in personam* against either party to the suit, the Federal court has nothing to do with them, unless they are made the basis of independent actions and rest upon their own ground of jurisdiction. Into this class of interventions will fall subsequent mortgages, suits for foreclosure which are deferred in right but which may be consolidated with the principal cause and all those cases where there is a chance that there may be something left in the litigation. In these cases a status is often given to the intervenors or co-complainants which is of value in the reorganization of properties after sale.

5. In the fifth class are interventions based upon contractual obligations which may be made or incurred by the receiver or other officer of the court in charge of the property during the litigation. If the property consists of such as is simply kept in custody, there will ordinarily be no such interventions possible. Such expenses as he would naturally incur are paid by the receiver or marshal out of moneys in his hands or advanced by him and are reimbursed to him out of the proceeds of sale. But where the court has impounded property which it is necessary should be kept in operation, as a manufacturing plant or a

railroad or carrier line, it is plain that the receiver is, by himself, or through his agent and servants, from day to day, constantly incurring contractual obligations which may give rise to rights in third persons, which rights must be somewhere adjudicated, if disputed. It is common and usual for the Federal courts to entertain interventions for this purpose. Up to a recent time it was necessary that it should do so, because of the rule that the receiver of such property could not be sued in any other jurisdiction without the permission of the Federal court. And it is still common practice to obtain such leave before instituting a suit against the receiver in another jurisdiction. But by a recent amendment of the Judiciary Act applicable to the United States courts, it is now possible to sue receivers in the State courts without such permission, and the receiver must go there and defend. The result of the judgment of the State courts, however, in these cases, is not to directly affect the property or fund in the hands of the Federal court. Such judgment must, notwithstanding the right to sue the receiver elsewhere, be brought to the Federal court by an intervention, and there determines nothing except the fact that there was a cause of action. It still remains with the Federal court as to what shall be done with it in respect of payment as preference, or otherwise, over the other claims litigated in the court. And it is possible for the Federal court to refuse to such a judgment the preference to which it is apparently entitled, because of the lack of equity in the intervenor's position.

As is manifest, the contracts of the receiver may cover any subject-matter which is the basis of ordinary commercial dealing. Interventions for the purpose of requiring payment by the receiver out of the funds in the power of the court, based upon his contracts, are as broad in their nature and multitudinous in their character as the general field of legal obligations. The Federal courts, either in open session or in Chambers, or through Masters in Chancery appointed for that purpose, will consider all of these contested matters through the means of interventions and make such interlocutory or final orders in each case as may seem proper. These orders when made are final adjudications of the particular matter in controversy, and where they

result in the declaration of the liability of the receiver, serve as a protection to him in the payment of money or in the delivery of property, if such is the subject of the intervention.

6. The last class of interventions includes those based upon the torts of the receiver in the management of property in the control of the court. When it comes to this class of proceedings, it would seem as if the limits of the law had been reached, for the court is called upon to allow against the fund, claims or charges which rest upon the express misconduct or misfeasance of its officer. And yet the operation of going concerns is of such a precarious and dangerous character that with the utmost care and caution which can be exercised, liabilities of this kind will be incurred without moral or personal fault on the part of the receiver in charge. Hence, from the necessities of the case the court cannot afford to mulct its own officer for doing that which experience has shown is unavoidable. The general law fixing upon a receiver, therefore, in the operation of a railroad or other property, liability in tort for negligence through the misconduct, inattention or wrong of himself or the servants and agents whom he necessarily employs, the reciprocal rights of persons who have been injured must be protected, and they can only be protected by requiring that they should be paid the measure of their damages out of the fund or property which the court and its receiver are managing. The court in a sense, therefore, makes itself party to the wrong, for it exonerates its officer and protects itself by requiring the payment to be made as if it were an expense legitimately incurred. Under this head, all claims for damages to property or for personal injuries incurred by employes of the receiver, or members of the general public, may be made the subject of interventions, and result in orders making such claims preferential in character over the rights of the original parties to the suit. And the receiver is generally directed to pay such damages at once out of the current incomes, where they are sufficient for that purpose, as if the lives and limbs of the public were part of the anticipated cost of operating the property.

The above described forms of interventions which may be brought in the Federal courts include, practically, all which are

in ordinary practice. There may be others, and there are often attempts to intervene for purposes not here mentioned, but these will be found to be fairly inclusive. There remains, therefore, for the general purposes of this paper nothing more than to mention a few of the practical incidents which attach to such interventions as a whole.

There are apparently no formal pleadings required for matters of this character. The whole subject comes up for consideration when the intervening petition is filed, which fairly states a claim which can be adjudicated. The matter is usually referred to a master, either specially, or to one of the standing masters of the court, and upon a day set, any of the parties interested in the cause may appear to contest the rights of the intervenor, and this hearing is without formal pleadings. Any matter of defense may be set up and heard. It sometimes happens, however, that objections are filed by the complainant, or other party to the suit, or by the receiver, and these constitute a pleading for practical purposes. That the courts, however, are not particular as to the forms of these matters is apparent from the fact that any irregular pleading inserted in the cause by a person who is or ought to be a stranger to it may be treated as an intervention. Thus in one case where a person at his own instance was improvidently made a defendant and filed a crossbill, such crossbill was treated as an intervention in his behalf, although the order making him a defendant was set aside. So, also, as has been heretofore noted, an original bill in equity, or what would standing alone be such, if ancillary to a pending proceeding, may be treated as an intervention and the rights of the parties adjudicated upon it.

The judgment or decree entered by the court as a determination of the intervention is usually in the form of a confirmation of the master's report; which, however, may be overruled or modified if the court sees fit. This is a final determination of the controversy within the meaning of the acts relating to appeals, and the persons affected by the judgment may take the subject of the intervention to the higher court for consideration without affecting the main suit, or withdrawing it from the jurisdiction of the court below. So far have the courts gone in this respect

that the Supreme Court of the United States has held that for the purposes of appeal the intervention is a separate suit, although, as is manifest, for the purposes of original jurisdiction, it is very far from being a separate suit.

In this state of the law it is plain that there may be and usually are, at the time when a final decree would be appropriate in the principal cause, interventions still pending, unadjudicated, or appealed, for determination by the United States Circuit Court of Appeals, or the Supreme Court of the United States. But for this reason the cause below is not suspended. An expedient has been devised whereby the principal cause can be for all practical purposes proceeded with, wound up and the property discharged from the custody of the court, without awaiting the adjudications which may have to occur upon these matters. Indeed, practical experience shows that in the foreclosure of railroads, interventions based upon the receiver's contracts and torts may have to follow his discharge, since up to the very moment that he turns over the control and custody of the property as the officer of the court in accordance with its decree, he may be incurring such obligations; and he would never reach a place where they could be said to be all discharged and liquidated. An accident imputable to negligence upon the road may happen at the moment the court is freeing the receiver from responsibility, and the facts may not be determined for days or weeks thereafter. Interventions based upon such subjects, therefore, in the nature of things, cannot be cut off at any given point in such a way as to free the receiver or court from duties in respect of them. Hence, in the framing of final decrees in such causes, it is necessary to provide that pending interventions shall not be thereby adjudicated or determined, but may be retained by the court for future consideration; and that future interventions may also be filed within a period which the court may by the decree prescribe, and that these interventions may in like manner be considered and determined. When this is done, it is held that an intervenor whose claim has not been adjudicated, has no appealable standing so far as the principal or final decree is concerned. As his rights are reserved by the decree, he is not prejudiced. Therefore, he cannot for purposes of litigation or to enforce any



supposable right suspend the operation of the decree. Yet, manifestly, provision must be made for the liquidation or payment of any such claims as may be thereafter adjudicated; which is not done by retaining the property in the possession of the court by the final decree, after the sale, which is ordinarily required by the final decree, but by imposing upon the person to whom the property is adjudicated or the purchaser at the sale, as a part of the purchase price or consideration, the duty to pay any and all such claims as the court may thereafter, within the limits of the decree, find to be preferred in right to the complainant's cause of action. And this obligation on the part of the purchaser or recipient of the property is enforced by a provision which permits the court to take back the property into its hands, or those of its officers, upon the failure of such person to pay as the court may by its orders direct. So far as interventions already adjudicated are concerned, the court provides for them by fixing the minimum or upset price which the master is required to obtain at the sale, this being made sufficient to cover the court costs and all preferential claims adjudicated up to that time. It is only the claims which have not been settled or adjusted that are made the subject of the conditional promise on the part of the recipient of the property. By this means the court is enabled to determine the rights of the parties in the principal cause and to enforce those rights by a final decree, which may require the sale of the property, and to deliver the property to the purchaser or other party, and to discharge its officers from the care and custody and responsibility of the same, notwithstanding that there may be large numbers of interventions which will require settlement in the future. The purchaser or recipient of the property thereafter assumes the burden of contesting such pending or future interventions, and as a matter of fact and experience, pays them like any other judgment where determined in favor of the intervenors and charged as preferential in right.

Owing to the lack of understanding of the real nature of intervening petitions and the fundamental ground upon which the court acts, attempts are often made to extend the jurisdiction of the Federal court upon petitions of this character to matters or

for results which the court ought not to consider or to effect. In a railroad foreclosure suit, a deficiency decree against the defendant corporation for the amount of indebtedness not satisfied out of the proceeds of sale is proper, because such is the original cause of action of the complainant. But effort is sometimes made by individual bondholders through interventions to enforce some statutory or common law liability upon the stockholders of the defendant corporation. While there may be no direct adjudication to that effect, reported, it is evident that this would be an extension of the jurisdiction of the Federal court beyond reason. Such a proceeding has nothing to do with the property in the hands of the court out of which all rights of intervenors must of necessity arise. If the claim of the intervenor is not a charge upon the specific property impounded by the court, he has no relation in law or equity to it. He must resort to the ordinary tribunals, and in the ordinary way, if he seeks to enforce any merely personal liability, whether upon the corporation or its stockholders. There may be, of course, causes in which the entire assets of a corporation are taken in charge by the court, as upon creditor's bill, where the individual liability of the stockholders of the corporation may be an asset in the hands of the receiver or other officer of the court. In that event, at the suggestion or motion of a creditor, no doubt the object of the principal cause would justify the enforcement of the liability. But it will be seen that this is really the purpose and object of the principal suit. The matter does not arise collaterally. And the personal liability is one of the property interests seized.

So in other cases, attempts have been made through interventions to try titles or rights which have been derived through the receiver, or by operation of the decrees or judgment of the court. These also are not properly subjects of interventions, although the courts have indeed held that a bill or motion may be entertained as ancillary to a decree or judgment, for the interpretation of that judgment or decree at the instance of a person who claims title under it. This is another case of the extreme limit of the principle.

Interventions are also attempted and sometimes entertained to force upon the receiver a duty to make some equitable contract

in favor of a public interest. Where such an intervention is to be considered, it ought to rest upon the propriety of the court's advising the receiver, and the proceeding should be considered as in the nature of a petition by him for advice. There has been, however, an instance where the intervening petition of a stranger to a suit was entertained to force the receiver to make a contract for the electric lighting, public and private, of a city, which was dependent upon the operation of the property in the hands of the receiver for that purpose. And in that case the judge of the United States court said that he would consider the application out of public necessity and because he would not permit his receiver to leave the city in darkness for want of a proper contract.

These considerations and illustrations will serve to emphasize the view that there is no portion of the law of this country which is more interesting in its development than this particular matter, and that we have in it something closely analogous to the development of the jurisdiction of the Court of Chancery, which we are accustomed to consider as the most notable illustration of the growth of judicial law. Apparently little attention has been given to this subject, except by the courts and counsel directly engaged in it; and yet the records of the Federal courts are to-day filled with the orders and decrees made in this class of cases. Anything like a full examination of the authorities upon the subject would require the Federal reports to be examined page by page, for neither the digesters or those who have prepared the indices to these reports have apparently had any comprehension of the importance of the questions. The law and practice upon these subjects are very well understood practically by the judges of the United States courts and by a few counsel accustomed to handle them, but they have not received the attention they deserve from either the digesters or text-writers.

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## PUBLIC DEFENDERS.

Last winter there were introduced in the legislatures of more than a dozen States of the Union, bills to provide for a public defender whose duty it should be to advise and defend those accused of crime, and to represent those charged with being lunatic or insane.

The measure met with a favorable reception among a large class of people,<sup>1</sup> and was widely commented on by the public press.<sup>2</sup> The purpose of the bill was to remove or mitigate grave evils in our criminal jurisprudence. Every year witnesses a host of judicial crimes. Every lawyer not deadened in feeling by constant contact has seen and felt these evils a score of times, and every reader knows of them in a dim half-conscious way; but the public mind has long grown callous and insensible to them.

Innumerable innocent boys and girls and men and women are recorded as pleading guilty and railroaded into jail because too dazed to understand their rights and legal position. Hundreds of men and women plead guilty because advised to do so by some court or police officer and fear makes them obey. Others plead guilty and suffer punishment by fine because it is cheaper than counsel and they can better stand the disgrace than the money loss. Others are ruined by payment of counsel fees in order to be protected from a malicious prosecution. Others are robbed by shysters, and still others are neglected by irresponsible court appointees. The patriotism and love of country of all these dies and their hearts are filled with bitterness, to the destruction

<sup>1</sup> The writer, whose name was connected with the bill, received hundreds of commendatory letters, from all parts of the country, regarding it.

<sup>2</sup> Some 200 papers, so far as the writer knows, mentioned and ex-

plained the measure. Of those making editorial comment, just one-half were favorable to it; forty per cent were opposed, and about ten per cent thought some less expensive remedy might be devised.

of the happiness of the individual and the detriment of the State.

Persons accused of petty offenses have always been allowed counsel to conduct their causes.<sup>1</sup> But from Henry I. to William III. of England the right to counsel was denied in all capital cases.<sup>2</sup> Afterwards it was extended at various times until full defense by counsel was allowed.<sup>3</sup> Reasons for this denial were given<sup>4</sup> but were never satisfactory.<sup>5</sup> There was, however, some compensation for the denied privilege; for, humane judges declared themselves the prisoner's counsel, and acted as such to the extent of seeing that the proceedings were legal and regular,<sup>6</sup> and the State's attorney was generally required to produce all the eye-witnesses, and develop all the facts both for and against the prisoner, and to observe all the requirements of an impartial investigation. Trials, except under venal judges like Jeffreys and Scroggs, became calm and serious inquiries, unmarked by prejudice and untainted by rancor. The whole court endeavored to lay bare the truth whatever it might be. Courts were jealous of the prisoner's rights, and the State's attorney respected them. The ancient records disclose few cases where he overstepped the boundaries of court rules or court decorum. Under such a system counsel was not greatly needed. Penalties were, indeed, severe,<sup>7</sup> but the procedure was reasonably fair and wholly free.

The duty of prosecuting officers is really the same to-day. It is still the duty of the State, and of the court, its instrument,

<sup>1</sup> 4 Blackstone Com. 355.

<sup>2</sup> *Id.*

<sup>3</sup> Stat. 6 and 7 Wm. IV., c. 114.

<sup>4</sup> The reason usually given is that the judge was counsel for the accused.

<sup>5</sup> 4 Blackstone Com. 355. Lord Coke said it was "because the evidence to convict a prisoner should be so manifest as it could not be contradicted" (8 Inst. 137), which Lord Nottingham declared to be the only reason. 3 St. Trials, 926.

<sup>6</sup> 4 Blackstone Com. 355.

<sup>7</sup> Mary I., upon appointing Sir Richard Morgan Chief Justice of the

Common Pleas, enjoined him that the justices should not sit in judgment otherwise for her highness than for her subjects and refers to a contrary practice as error. Hollingshed 1112, 4 Blackstone Com. 355.

<sup>7</sup> How severe, and therefore, to what extent counsel was denied, is shown by the fact that about the time of the separation of the colonies from Great Britain, there were 160 crimes on the English statutes punishable by death, without the benefit of the clergy. 4 Blackstone Com. 18.

quite as much to protect the innocent as to punish the guilty. Honest administration of justice is the end sought, and court officers are not exempted from the social obligation to be honest, nor the legal one to try causes according to the rules of the court and the law of the land.<sup>1</sup> But we have drifted far away from that free and impartial investigation which was the pride and boast of the English law.<sup>2</sup>

The courts no longer interfere to do justice to the prisoner unless specially solicited to do so. The district attorney is not required to develop all the facts in the case. He is no longer an impartial investigator seeking for justice and conforming to the law. He has become the hired and violent advocate seeking only to win.<sup>3</sup> In his mind he soothes his conscience by putting the responsibility on the jury. And so he misstates the facts and obtrudes improper matter into his opening statement to the jury;<sup>4</sup> impresses the jury by the suggestion of other crimes than the one charged;<sup>5</sup> attempts to get improper matter before the jury;<sup>6</sup> abuses witnesses;<sup>7</sup> injects his personal and other unsworn and

<sup>1</sup> Wharton Crim. Law, Sec. 3003; State v. Smith, 75 N. C. 306; People v. Lee Chuck, 78 Cal. 317; People v. Wells, 100 Cal. 459.

<sup>2</sup> We can only cite a few cases of official abuses for want of space. The reports are full of them. And yet they show but a small percentage of the real ones, because the poor cannot appeal and in many instances the law prevents the defendant appealing on such grounds.

<sup>3</sup> People v. Lee Chuck, 78 Cal. 317. The court, referring to district attorneys, says: "They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. \* \* \* *We make due allowance for the zeal which is the natural result of a legal battle like this, and for the desire of every lawyer to win his case,*" etc.

<sup>4</sup> Sasse v. State, 62 Wis. 530; Cole-

man v. State, 111 Ind. 563; State v. Jackson, 8 S. W. Rep. 749; Lane v. State, 85 Ala. 11; O'Brien v. Commonwealth, 12 S. W. Rep. 471; Randall v. State, 132 Ind. 539; People v. Fowler, 62 N. W. Rep. 572.

<sup>5</sup> People v. Wells, 100 Cal. 459; State v. Trott, 36 Mo. App. 29; Gale v. People, 26 Mich. 161; People v. Divine, 95 Cal. 227; People v. Cohoon, 88 Mich. 456; Leahy v. State, 31 Neb. 566.

<sup>6</sup> Flint v. Commonwealth, 23 S. W. 346; Johnson v. State, 88 Ga. 606; Nalley v. State, 28 Tex. App. 387; Barbee v. State, 23 Tex. App. 199; Taylor v. State, 27 Tex. App. 464; Gazley v. State, 17 Tex. App. 267.

<sup>7</sup> Lewis v. State, 15 S. E. Rep. 489; State v. Pilkington, 60 N. W. Rep. 502; Hodge v. State, 7 So. Rep. 593; People v. Carr, 31 N. W. Rep. 590; People v. Beelfus, 59 Mich. 576; Butler v. State, 27 S. W. Rep. 128; People v. O'Brien, 96 Mich. 630.

damaging statements into the testimony;<sup>1</sup> calls the defendant all the vile names in his too plethoric Billingsgate dictionary<sup>2</sup> and resorts to all sorts of reprehensible devices to awaken prejudice;<sup>3</sup> urges upon a too pliant court the giving of improper instructions;<sup>4</sup> opens the public treasury for funds to secure evidence for conviction but not for evidence of innocence; and brings to his aid a detective and police force ever too ready to forge a missing link in the legitimate testimony.<sup>5</sup> This drifting away from the old landmarks is the natural result of many causes. The vicious assumption that the defendant is always guilty;<sup>6</sup> the prosecution's vanity of winning causes,<sup>7</sup> and desire to uphold a blundering police; the fear of newspaper criticism; and the money reward often given for each conviction,<sup>8</sup> all con-

<sup>1</sup> *State v. Carter*, 8 Wash. 272; *Schottler v. State*, 27 N. E. Rep. 149; *Holden v. State*, 58 Ark. 473; *Martin v. State*, 56 Am. Rep. 812; *Hardike v. State*, 67 Wis. 552; *State v. Smith*, 75 N. C. 306; *People v. Ah Len*, 92 Cal. 282; *Laubach v. State*, 12 Tex. App. 583; *Green v. State*, 17 Id. 395; *Cross v. State*, 68 Ala. 476; *Tillery v. State*, 5 S. W. Rep. 842; *State v. Woolard*, 20 S. W. Rep. 27; *McDonald v. People*, 126 Ill. 150; *Coleman v. State*, 6 So. Rep. 290; *State v. Helm*, 61 N. W. Rep. 246; *People v. Treat*, 48 N. W. Rep. 983.

<sup>2</sup> *Hatch v. State*, 8 Tex. App. 416; *Bessette v. State*, 101 Ind. 85; *Watson v. State*, 22 S. W. Rep. 1088; *Stone v. State*, 2 S. W. Rep. 585; *Thompson v. State*, 26 N. W. Rep. 987; *State v. Fischer*, 124 Mo. 460; *State v. Young*, 21 S. W. Rep. 879; *State v. Smith*, 75 N. C. 306; *State v. Ulrich*, 19 S. W. Rep. 656; *Crawford v. State*, 15 Tex. App. 501; *State v. Foley*, 12 Mo. App. 431; *State v. Lee*, 66 Mo. 165.

<sup>3</sup> *State v. Good*, 46 Mo. App. 515; *Hall v. U. S.*, 150 U. S. 76; *Turner v. State*, 68 Tenn. 206; *State v. Jackson*, 8 S. W. Rep. 749; *Cartright v. State*, 16 Tex. App. 478; *People v. Young*, 16

S. W. Rep. 408; *Moore v. State*, 2 S. W. Rep. 887.

<sup>4</sup> *People v. Van Eman*, 43 Pac. Rep. 520.

<sup>5</sup> My experience and observation fully supports this statement. Besides, a judge of many years experience on the bench hearing criminal cases, told me he would not believe a policeman under oath if he had been on the force two years, so clammy were they and so bent on justifying arrests and securing convictions. A criminal court lawyer, grown gray in the service, corroborated the statement. A court stenographer of many years practice said he never knew a case where a pertinent fact was missing, but what it could be supplied at the last moment by the police, and I heard a policeman testify in cross-examination (he was new) that he was instructed to testify for the people, to color his testimony against the defendant and that he regarded that as part of a policeman's duty.

<sup>6</sup> *People v. Wells*, 100 Cal., p. 465.

<sup>7</sup> *People v. Lee Chuck*, 78 Cal. 339.

<sup>8</sup> Many States have abandoned the pernicious system that pays for convictions instead of services, but in

join to warp the prosecuting officer from a fair and impartial attitude toward the accused, and incite him to override court proprieties and legal rules to secure conviction.<sup>1</sup> The arrested man is not brought before an impartial tribunal for trial, but before one where legal skill, police venality, money reward, and oftentimes popular prejudice are arrayed against him, and every effort is made to secure not justice but conviction. He cannot act for himself.<sup>2</sup> The labyrinth of legal technicalities is an unknown land to him. He could not lay the foundation of an expert's testimony or to impeach a witness and does not know what is competent or proper evidence. But he does know that to go into court without counsel would be equivalent to an invitation to convict which a jury would readily accept. In this condition, when he is utterly unable to act for himself, when before him stands all the menacing machinery of the penal law, when he is deserted by friends, assailed by foes and dazed by his surroundings, counsel is absolutely necessary to secure justice. In a country whose primary function and highest duty is to protect and defend its people one would expect to find courts provided with all the essentials of justice. But they are not. The prisoner is merely told that he may buy this essential and thus buy justice in a land that boasts that justice is free.

The arrested must have counsel; but few know whom to send for. Their incarceration prevents them seeking a proper attorney. Facts menace and time presses. Here is the shyster's opportunity. He, or his confederate, visits the prisoner in jail, works on his fears, secures his money and botches or neglects his cause. These evils are the constant subject of comment by courts and bar associations, but the wrongs continue. Women pose as angels of mercy, and advise the hiring of questionable

some the rule still prevails that the prosecuting officer must convict before he can be paid. *Patton v. State*, 41 Ark. 486; *State v. Thompson*, 39 Mo. 427; *Keys v. State*, 7 Lea (Tenn.), 406; *State v. Bachman*, 6 Lea (Tenn.), 649.

<sup>1</sup> See note 3, *ante*, p. 395.

<sup>2</sup> How utterly inefficient a layman

is to manage a criminal case is suggested by the old saw that "a man who is his own lawyer has a fool for a client;" and this is enforced by the experience of Horace Greeley, in a series of libel cases, where he appeared for himself with disastrous results and was compelled to admit his inability.



attorneys for a share of what is in it; and runners for law firms pose as philanthropists for a division of the spoils,—all to the irreparable injury of the accused.

The constitution of the United States provides that the accused shall enjoy the right to a speedy trial, to be informed of the nature of the accusation, to be confronted by witnesses, to have process for obtaining them, and to have the assistance of counsel for his defense.<sup>1</sup> If we were to-day unfettered by custom, the plain construction would be that all these rights should be free, because a right ought not to be impaired, nor burdens imposed to its perfect exercise.<sup>2</sup> Ought a defendant be required to pay mileage fees, and fees for subpoena-service to entitle him to witnesses? Could he be compelled to pay a jury per diem or court-room rent as a condition to a jury trial? Could he be required to pay scriveners' fees as a condition to being informed of the charge against him? Could he be compelled to pay the sheriff his losses in board-bill profits to secure a speedy trial? What would be thought of the right of freedom of worship with a condition of five dollars a prayer attached to it? or of free speech with a dollar a minute tax tied to the privilege of exercising it? or of freedom from search with a proviso that ten dollars per week be paid to the police captain of the district? Such conditions would be a public disgrace and national scandal, and would not be tolerated for a moment.

And yet the right to counsel for defense is found in the same bill of rights, and in the same section and even language as many of those mentioned, is subject to the same canons of construction and is under the same fundamental rule that a constitutional right cannot be impaired by burdening it with obligations.<sup>3</sup> If all other rights there enumerated must be free, on what principle should he be required to pay for counsel for defense? Justice should be free; but it is not. If the accused has money he must pay for his defense, no matter what hardship it may involve.<sup>4</sup> It may ruin his business, destroy his credit, and reduce

<sup>1</sup> U. S. Const., Amendment VI.

<sup>2</sup> *Saco v. Wentworth*, 37 Me. 165; *Green v. Briggs*, 1 Curt. (U. S. Cir.) 311.

<sup>3</sup> 1 Burr. Tr. 158-9.

<sup>4</sup> The power to appoint counsel is limited to appointments for those unable to pay. See cases in notes Nos. 1 and 3, *post*, p. 399.

him and his family to want, but he must pay or go without counsel and, therefore, without justice. Suppose he pays, is innocent and is acquitted. Is it just that he should have been compelled to pay counsel fees through the envy of rivals, the blunder of officers or the malice of foes? Is not the disgrace of arrest, the pain of imprisonment, and the torture of trial quite enough for him to suffer without adding a financial punishment in compulsory counsel fees?

It is not forgotten that if the counsel pleads his poverty, and places on record that fact, which is regarded by many as a cause of crime, the court may appoint counsel to defend him.<sup>1</sup>

This is a step towards justice, but it is not the full step, because it is seldom adequate, is never free and the appointment is not just to the attorney. Court appointees do not come from the successful ranks of the profession. Once in a while the court braves the resentment of a busy lawyer and appoints him. Sometimes a brilliant young lawyer, generally in novels, successfully defends. Now and then an able lawyer volunteers his services. But these are exceptional cases. In practice appointees come from the loafers in court and from the young, the untried and inexperienced in the profession, without money, skill, or interest in the result. They are often caught up without a moment's notice and compelled to go to trial without time to prepare on the law or to secure testimony. The defense is almost of necessity inadequate, and about the wisest course for a pauper prisoner caught in the mesh of misunderstanding or circumstantial evidence is to plead guilty, earn consideration by "saving the county expense,"<sup>2</sup> and throw himself on the "mercy of the court."

But even services by appointed counsel are not free. The legal theory is that counsel in a pauper case renders a service not to the State but to the accused, and on this ground counties have been held not liable for such services<sup>3</sup> and prisoners

<sup>1</sup> *Dukes v. State*, 11 Ind. 557; *Vise v. Hamilton Co.* 19 Ill. 18; *Weeks on Attorneys*, Sec. 184.

<sup>2</sup> Think of the spectacle of a court remitting part of a criminal's legal

punishment for a money consideration!! And yet who has not witnessed it?

<sup>3</sup> *Case v. Shawnee Co.*, 4 Kan. 511; *Gordon v. Dearborn Co.*, 52 Ind. 322;

who were able required to find their own attorneys. If the accused asks for counsel and gets it he must pay for it if he ever becomes able, for the doctrine never obtained in this country that a lawyer works for nothing. The accused is under actual legal obligations to pay.<sup>1</sup> The system at best, therefore, is one in which the accused must pay for justice either in money or credit, and one in which the court may compel any attorney to give the necessary credit to a pauper. It is said that this is an incident to the profession. Professional ethics and sometimes the law requires the lawyer not to reject the cause of the defenseless or oppressed; professional ethics and sometimes the law, also requires a physician to never refuse attendance on the sick. It is just as reasonable as to ask a lawyer to defend a pauper prisoner, and yet no one would think of compelling a physician to be at the free command of an alms-house superintendent.

Criminal cases, especially pauper ones, are often lost, and every case lost detracts from the reputation of the successful lawyer. There is no justice in asking him to sacrifice such a reputation without compensation. Why should an attorney be required to give his time and skill and energy,— his sole capital,— for a book account against a pauper prisoner? He is no more interested in seeing justice done than any other citizen is, or ought to be. True, lawyers have been generous in volunteer services in behalf of the unfortunate and despised so as to secure them a fair trial; but is it just to impose on them the burden of laborious, and, in practice, gratuitous services, or the alternative of witnessing all the principles of law and justice outraged in the conviction of an undefended prisoner?<sup>2</sup>

But there is still a broader view of the matter of free defense. The highest function of the State is to secure the lives and liberties of its people. For that purpose governments are instituted among men, and the whole machinery of legislation and law established. In its very organization is the implied promise

People v. Albany Co., 28 How. Pr. (N. Y.) 22; People v. Supervisors etc., 78 N. Y. 622; Wright v. State, 3 Helsk. (Tenn.) 256; Elam v. Johnson, 48 Ga. 348; Kelly v. Andrew Co., 43

Mo. 338; Jones v. Coza Co., 16 La. Ann. 428.

<sup>1</sup> Rowe v. Yuba Co., 17 Cal. 61.

<sup>2</sup> Carpenter v. Dane Co., 9 Wis. 274.

that because a man surrenders his inherent right to defend himself the government will defend him when his life or liberty are menaced. It is a duty connected with its very existence. And so it operates its diplomatic service and dispatches its warships to defend its citizens abroad. Rights are not the less sacred under our own flag; and the same duty should be performed at home not only freely but gladly whenever the citizen's life or liberty are in danger through official blunders,<sup>1</sup> or malicious witnesses, or overzealous officers. A posse of police may be called out to protect one from personal assault. But liberty is not less sacred than flesh and bones. Lacerated tissues may grow sound and broken bones may knit, but the gash of a wrongful imprisonment never heals.

The objections to the bill are two:<sup>2</sup> The first one is as to the cost. In any broad view of the question the cost will be seen to be really less than it is now. Money is not cost; it is only a measure of it. Cost is the draft of time and force and energy made upon a people. War would be a fearful cost though every soldier served free and every garment, cartridge and ration was a compulsory contribution. Time, energy and effort,—these are the elements of cost because they are the prime factors of wealth. The defense of the accused under a public defender law would require no more time nor effort than is now consumed. Indeed, quite the contrary, for, orderly arrangement of causes for trial could be far better effected between opposing officers than between a district attorney and a dozen lawyers with conflicting civil business. Besides, an officer devoted to that business could actually accomplish more work with less effort and in

<sup>1</sup> The fallibility of the judgment of the police is strongly suggested by the fact that in New York City, during the year ending October 31, 1896, the police arrested 2,455 people as "suspicious persons," every one of whom was discharged. See City Magistrates Report, p. 16. See also note 1, *post*, p. 402.

<sup>2</sup> In the newspapers which opposed the Public Defender's bill the two reasons mentioned were given, though

particular stress was laid on the first. The New York *Tribune* also added one which no other journal seemed to care to adopt, viz.: that a public defender, by some hocus-pocus not mentioned, would "organize a public trust in law breaking." The district attorney with his power of dismissal might, but the public defender with no such power—well, the objection is unworthy of the great paper.

less time. Viewed from the broad plane of a statesman who would conserve the energies of the people and direct them to the best results, there would be an actual saving in cost,—that is in the factors of wealth.

The other objection to the bill is: that it would prevent young lawyers having any one to practice on. This objection has actually been seriously made. Is it the State's business to furnish victims to young lawyers who lack the wit to rise in the ordinary way? Are we so in need of more lawyers that the State should sacrifice its duty, to encourage them? The worthy young practitioner should be quite content to learn as he learns in civil cases, as junior or associate counsel; and he is.

The unthinking suggestion is made, that a criminal deserves no consideration. But it must be remembered that as a fact one-half of those arrested and charged with crime are actually innocent,<sup>1</sup> and in the eyes of the law all of them are so. Every person is presumed to be innocent and that presumption goes with him through every step of the trial until the verdict is rendered. The law ought to treat him as it presumes him.

Free counsel in criminal cases is in line with free juries, free witnesses and free courts; and we are approaching it by slow but certain steps. We long since took the gag out of the prisoner's mouth; we have let him meet the witnesses face to face; we have brought in his own; we have read him the charge in open

<sup>1</sup> In New York for the year ending Oct. 31, 1896, the arrests for felonies were 7021, of whom only 4207 or 60 per cent were even held to answer. The number of arrests for misdemeanors was 16,254 of whom only 8665, or 53 per cent, were even held to answer. The district attorney refuses to make known the percentage of actual convictions.

In Chicago, in 1895, there were 74,468 arrests finally disposed of. In the police court 49,087 or over 65 per cent were discharged, and 22,378 or less than 31 per cent punished. I have no record of the final disposition of cases held to answer.

In San Francisco, in 1894, drunks excepted, which are cases of misfortune, rather than of crime, and the party charged pays a fine because it is cheaper and quicker than paying an attorney, there were 13,683 arrests, of which 12,669 were finally disposed of. Of these 6,942 or over 54 per cent were dismissed in the police courts. In the court of record there were, including those discharged on their own recognizance, 737 cases disposed of. Out of these there were only 304 convictions or less than 42 per cent.

court; we have permitted him to pay for a representative of his stammering tongue; in some cases we have paid for counsel; and in foreign ports our consuls act for American citizens and no bill is ever presented to them. The State has no desire to wrong its people. Its citizens are not its enemies. It is not interested in convicting the innocent. It is not interested in the impoverishment or disgrace of its people. Their full protection is its legitimate care, and in giving it, the State will not only perform its duty but will promote exact and equal justice, protect the poor, save the innocent and remove an unjust burden from a generous profession.

CLARA FOLTZ.

TEMPLE COURT, NEW YORK.

## A LEGAL VIEW OF WOMEN'S SUFFRAGE IN AMERICA.

The recent action of the Annual Convention of the W. C. T. U. in reaffirming the faith of that body in both the justice and propriety of women's suffrage, and the adoption of similar resolutions by less prominent organizations in the United States and in Europe, have given an additional impetus to the cause. It is not unnatural that the "anti-suffragists" have begun to bestir themselves and to put forth every effort to meet and repel every forward movement in this direction made by the women and their male champions. It occurred to the writer that all persons who would fully comprehend the subject should found their ideas in a thorough knowledge of the law governing it. That this is indispensable is rendered apparent by merely mentioning the fact that the laws affecting the subject are generally fundamental laws, which the people are always slow to change.

**THE ELECTIVE FRANCHISE.**—The elective franchise is not a vested right but depends upon the laws defining the qualifications of those who may exercise it.<sup>1</sup> The elector's right is not that of property; it is not assets, nor property of inheritance.<sup>2</sup> The right is not one of unrestricted license but is only political to be given or withheld at the pleasure of the law-making power of the sovereignty, and it is not deemed to be within the privileges and immunities guaranteed to the citizen by the constitution of the United States<sup>3</sup> as those terms have been understood and applied, and, therefore, no such right was derived from their use and in the Fourteenth Amendment to that instrument, which merely furnished additional guaranty for the protection and immunities without extending their import.<sup>4</sup> The right of suffrage being

<sup>1</sup> *Blair v. Ridgely*, 41 Mo. 63; *Spencer v. Registration Board*, 1 McArthur, 169; 29 Am. Rep. 582.

<sup>2</sup> *Brown v. Hummel*, 6 Pa. St. 86; *White v. Multnomah County*, 13 Oreg. 317; 45 Am. Rep. 843, note.

<sup>3</sup> Art. 4, Sec. 2.

<sup>4</sup> *People v. Barber*, 48 Hun, 198; citing *Van Valkenburg v. Brown*, 48 Cal. 43; 18 Am. Rep. 136; *Minor v. Happersett*, 21 Wall. 162; U. S. v. *Cruikshank*, 92 U. S. 542.

created by organic law may be modified or withdrawn by the sovereign authority conferring it.<sup>1</sup>

**POWER OF STATE TO REGULATE SUFFRAGE.**—"In our form of government the national legislature is governed by the constitution granting to it certain powers, which are called 'enumerated powers' and are in fact enumerated in the constitution itself; and any power not specified in the constitution specifically or by necessary implication does not exist at all. The Congress can claim no powers which are not thus granted. This applies not only to the constitution as originally made, but as it now exists with the amendments. *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 187; *U. S. v. Cruikshank*, 92 U. S. 542. The State on the contrary, by its constitution, takes away or limits legislative power, instead of giving it, as is done by the Federal constitution; and, except as limited by the constitution, the State or the United States, the State legislature may enact any law they deem for the welfare of the people under their jurisdiction."<sup>2</sup> The Federal constitution only guarantees that a citizen shall not be deprived of suffrage on account of race, color or previous condition of servitude.<sup>3</sup> The States have exclusive authority to regulate the right of suffrage and to determine who may vote.<sup>4</sup> Thus, in the case of *State v. Main*,<sup>5</sup> it was held that a law extending to soldiers the privilege of voting when out of the State, for State and county officers, was not unconstitutional by reason of not extending the same privilege to all the absent electors of the State. In the celebrated case of *United States v. Susan B. Anthony*,<sup>6</sup> Hunt, J., said: "The right of voting, or the privilege of voting, is a right or privilege arising under the constitution of the State and not

<sup>1</sup> *Re Duffy*, 4 Brewst. 531; *Calder v. Bull*, 3 Dall. 394; *Rich v. Flanders*, 39 N. H. 893; *Eagin v. Raub*, 12 S. & R. 360; *Anderson v. Baker*, 23 Md. 531; *State v. Adams*, 2 Stew. (Ala.) 239.

<sup>2</sup> *Bloomer v. Todd*, 8 Wash. Ter. 599; 1 L. R. A. 11. See *Morrison v. Springer*, 15 Iowa, 304; *Clayton v. Harris*, 7 Nev. 64.

<sup>3</sup> *U. S. v. Crosby*, 1 Hughes, 448.

<sup>4</sup> *Spragins v. Houghton*, 3 Ill. 377; *Huber v. Reilly*, 53 Pa. St. 112; *Anthony v. Holderman*, 7 Kan. 50; *U. S. v. Anthony*, 11 Blatchf. 200; *Anderson v. Baker*, 23 Md. 531; *Kinneen v. Wells*, 4 New Eng. Rep. 457; 144 Mass. 498; *Amy v. Smith*, 1 Litt. R. (Ky.) 342.

<sup>5</sup> 16 Wis. 398.

<sup>6</sup> 11 Blatchf. 200; see 16 Wall. 130.



of the United States. The qualifications are different in the different States. Citizenship, age, sex, residence, are variously required in the different States, or may be so. If the right belongs to any particular person, it is because such person is entitled to it by the laws of the State where he offers to exercise it, and not because of citizenship of the United States. If the State of New York should provide that no person should vote until he had reached the age of thirty-one years, or after he had reached the age of fifty, or that no person having gray hair, or who had not the use of all his limbs, should be entitled to vote, I do not see how it could be held to be a violation of any right denied or held under the constitution of the United States."

**FEMALE SUFFRAGE.**—Immediately following the adoption of the Fourteenth Amendment to the constitution of the United States several distinguished female advocates of the extension of the elective franchise, experimentally, undertook to vote for President and other officers. The contention was that the new law was not intended to be more liberal to negroes than to women. But in each case the privilege was denied to women. Notable among these experiments were those of Susan B. Anthony, above referred to, and Virginia Minor; in the latter case Mrs. Minor, a native born, free white citizen of the United States and of the State of Missouri, over the age of twenty-one years, wishing to vote for electors for President and other officers in the general election of 1872, applied to the defendant, the register of voters, to register her as a lawful voter, which he refused to do, assigning for cause that she was not a "male citizen of the United States," but a woman. She then brought this suit for willfully refusing to place her name upon the list of registered voters. A demurrer was sustained in the lower court and the judgment affirmed in the Supreme Court. The court said, in part: "The question is presented in this case, whether, since the adoption of the Fourteenth Amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. \* \* \* There is no doubt that women may be citizens. They are persons, and by the Fourteenth

Amendment all persons born or naturalized in the United States and subject to the jurisdiction thereof are expressly declared to be 'citizens of the United States and of the State wherein they reside.' But in our opinion, they did not need this amendment to give them that position. Before its adoption the constitution of the United States did not in terms prescribe who should be citizens of the United States, or of the several States, yet they were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal relations. The one is compensation for the other; allegiance for protection and protection for allegiance. For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of government. Citizen is now more commonly employed, however, and it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation and nothing more. \* \* \* This makes it proper to inquire whether suffrage was co-extensive with the citizenship of the State at the time of its adoption. \* \* \* When the Federal constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charter from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. \* \* \* In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all

citizens of the United States voters, the framers of the constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared."<sup>1</sup>

**RECENT STATUTES.**—Under the decisions it is clear that women have no right, under the Federal constitution, to exercise the elective franchise. In several of the States attempts have been made to give her the right to the general ballot by constitutional amendment but with negative results, with two or three exceptions. In many of the States the attempt has been made by legislative enactment but such movements have been vigorously combated before the people and in the courts, probably because that the elective franchise in the United States is seldom based upon a property qualification. Where such enabling acts have been passed they have been declared by the courts to be void as far as they apply to constitutional offices.<sup>2</sup> Thus, women are incompetent to vote for justices of the peace,<sup>3</sup> or for the removal of a county seat.<sup>4</sup> But the State legislature may regulate and control all elections and determine who shall be electors in all local elections for which the State constitution has made no provision, and in many of the States the right to vote in "school matters" has been given to women by statute.<sup>5</sup> Thus in the case of *Holmes & B. F. Co. v. Hedges*,<sup>6</sup> where the State constitution authorized the legislature to provide that there shall be no denial of the elective franchise at any school election on account of sex; and the common school law provided that "every person, male or female," shall be, if possessing certain qualifications, a legal voter at any school election, women may vote upon the question

<sup>1</sup> *Minor v. Happersett*, 88 U. S. 163. Opinion severely criticised, 8 Cent. Law Jour. 51, 52.

<sup>2</sup> *McCafferty v. Guyer*, 59 Pa.<sup>e</sup> St. 109; *Coffin v. Thompson*, 97 Mich. 188; 21 L. R. A. 662; 56 N. W. Rep. 567; 44 Am. & Eng. Corp. Cas. 127.

<sup>3</sup> *Scott v. Parry*, 52 Kan. 1; 20 L. R. A. 689.

<sup>4</sup> *Shingerland*, 59 Minn. 351; 61 N. W. Rep. 322.

<sup>5</sup> *Brown v. Phillips*, 71 Wis. 239; *Wilson v. City Council of Florence*, 40 S. C. 290, 426; 20 L. R. A. 720; *Weybridge School Dist. No. 1 v. Bridgeport*, 63 Vt. 383; 22 At. Rep. 570; *Re Akron* (Pa. D. S.), 16 Pa. Co. Ct. 252; 12 Lanc. L. Rev. 172; *Woodley v. Cllo*, 44 S. C. 374; 22 S. E. Rep. 410.

<sup>6</sup> 13 Wash. 696; 43 Pac. Rep. 944.

of increasing the debt limit of the school district. From an examination of the cases just cited it will be seen that the right of women to vote in school district and municipal elections is generally granted upon the property qualification basis. Such elections are held by the courts to be not general elections in which by a majority of the State constitutions "male citizens" only are allowed to vote; therefore this limited suffrage to women is free from any constitutional obstructions and is regulated solely by the special statute conferring it and the general election laws affecting it.

JAMES AVERY WEBB.

ST. LOUIS, MO.

## THE PROGRESS OF THE LAW.

Motion is the law of life. *E pur si muove*, "but it does move though," indignantly exclaimed Galileo, raising from his knees on which he had been forced by the holy inquisition to recant his declaration that the world revolved on its own axis. With many it has been thought that the law, or at least legal proceedings, should be an exception to this universal rule—move on or perish.

The survival of so many legal anachronisms, and the occasional reappearance of others, after so many statutes and so many decisions, and when the reason for them and a knowledge of their origin even has passed away, is fitly recalled by the fact that our time-pieces still mark the fourth hour with III which, we are told, is due to the fact that the king of France, to whom the first watch was carried, unable to understand its mechanism, criticised the IV and ordered it to be replaced by the letters which, with Chinese exactness of imitation, are used by us to-day.<sup>1</sup>

This is paralleled by many features of what we know as the common law, whose origin has been fictitiously claimed to be "as undiscoverable as the sources of the Nile." The sources of the Nile have now long since been discovered and as to the common law we know that its real origin was in the customs of our barbarous and semi-barbarous ancestors added to by the decisions of judges of more recent centuries most of whom were neither wise nor learned beyond their age. One of these, in haste to get to his supper, or half comprehending the cause, or prejudiced, it may be, against a suitor, or possibly boozy (and such have been kenned) has rendered a decision, another judge too indifferent to think for himself or oppressed by the magic of a prec-

<sup>1</sup> *St. v. Harris*, 106 N. C. 689.

edent, has followed, other judges have followed each other in turn and thus many indifferent decisions being interwoven with a greater number of sound ones, there was built up, piece by piece, precedent by precedent, that fabric of law, that patchwork of many hands, that conception of divers and diverse minds, created at different times, that jumble of absurdities, consistent only in inconsistency, which those who thrive by exploiting its mysteries were wont to style "the perfection of human reason — the Common Law of England." As a system, it resembles Otway's Old Woman, whose patched gown of many colors bespoke

"Variety of wretchedness."

An eminent lawyer thus characterizes it: "In the old volumes of the common law we find knight service, value and forfeiture of marriage, and ravishment of wards; aids to marry lords' daughters, and make lords' sons knights. We find primer seisin, escuage and monstrans of right; we find feuds and subinfeudations, linking the whole community together in one graduated chain of servile dependence; we find all the strange doctrines of tenures, down to the abject state of villenage, and even that abject condition treated as a franchise. We find estates held by the blowing of a horn. In short we find a jumble of rude, undigested usages and maxims of successive hordes of semi-savages, who from time to time, invaded and prostrated each other. The first of whom were pagans and knew nothing of divine laws; the last of whom came upon English soil when long tyranny and cruel ravages had destroyed every vestige of ancient science, and when the pandects, from whence the truest light has been shed upon English law, lay buried in the earth. When Blackstone, who had a professor's chair and a salary for praising the common law, employs his elegant style to whiten sepulchres and varnish such incongruities, it is like the Knight of La Mancha extolling the beauty and graces of his broad-backed mistress, winnowing her wheat or riding upon her ass." The same writer further pertinently asks, "When is it that we shall cease to invoke the spirits of departed fools? When is it that in search of a rule for our conduct we shall no longer be bandied from Coke to

Croke, from Plowden to the Year Books, from thence to the Dome Books, from *ignotum* to *ignotius* in the inverse ratio of philosophy and reason ; still at the end of every weary excursion arriving at some barren source of pedantry and quibble?"

To adapt this incongruous learning to the development of an advancing civilization recourse was had to the Roman or Civil law, a system known as Equity, by which a different kind of justice was administered in a separate court, so that the spectacle was often presented of a suitor recovering in the law court, being restrained from availing himself of the judgment by an order issuing out of chancery, or failing in the law court because he should have instituted proceedings in equity, or vice versa. Strange as it may now seem, there was a time when many eminent lawyers held to this absurd and illogical division between equity and law, as something fore-ordained in the very nature of things and indispensable and as being, in some indefinable way, connected with the maintenance of our liberties. Yet that system would permit a man to obtain a judgment, as a sacred right, on one side of Westminster Hall, when on the opposite side of the great hall of William Rufus, another court would be sitting which would hold him an unconscionable rogue if he attempted to enforce his judgment and would lay him by the heels if he attempted to do so.

Then even on the law side of the docket, remedies were divided into divers forms of action, so that if one brought an action of trespass when he should bring trespass on the case, assumpsit instead of covenant, or replevin in the *cepit* instead of replevin in the *detinet*, he lost his action. And yet a royal commission in England reported so late as 1831, "there is at present no authentic enumeration of all the forms of action." Indeed of the forms most commonly in use, the divisions and purposes were much in controversy and it was difficult in very many cases to be sure that you had your client properly in court. It was said that old Judge Cowen of the New York Supreme Court died in the belief that we had "not yet sounded the depths of trespass on the case," and the great Judge Story was possessed of the belief that Equity could reform a policy of Insurance.

It is only about fifty years since the movement was started which in England and in most of her colonies and in the greater part of the United States has swept away the distinction between law and equity and between the forms of action, and has substituted for them one form of action in which the plaintiff shall plainly and intelligibly, without undue repetition, state his ground of complaint and the defendant shall reply in the same way, so that the case shall be tried in a business-like mode upon the merits. Unfortunately the reformed procedure had to be intrusted for its successful working at first to judges and lawyers who had grown up under the old technicalities and consciously or unconsciously they endeavored to constitute the new system to be as much like the old one as possible. It was the old case of putting "new wine into old bottles." But the reform has made its way and the generation of lawyers now on the stage are astonished at the attachment of our predecessors to a system which in this State and some others they yielded only under the stress of the unheaval following in the wake of a great war.

The substance of the law, no less than the forms of its administration, has been from time to time so modified and modernized by statute that there abides the faintest perceptible relic of the old English common law. Strange to say the reform in England has been more complete, and the new system is simpler than in any State in this country. Such a thing as a demurrer, and the delay incident to it, is now unknown in the English practice, every defense being taken by answer, and legal defects in the complaint, if curable, being eliminated by amendment without delaying the trial.

Yet such is the force of habit, that in some of the less progressive law schools, until very recently, intelligent professors wasted almost the entire time of their students in teaching them the absurd farrago which used to be, a century or more ago, the law in a foreign country, but which for long years has not been the law there or anywhere else on the planet, under the delusion that because our grandfathers had learned law in that fashion we should still so teach it. At the same time, no learning was imparted to the young men of what a young lawyer must needs



know — the law, and the practice of the law *as it exists to-day* in the student's own State.

Happily, this system has probably been abandoned in the last of the schools and a modern and practical education is now vouchsafed to the young student everywhere.

WALTER CLARK.

RALEIGH, N. C.

## CAN EXEMPLARY DAMAGES BE BOTTOMED UPON NOMINAL DAMAGES?

This question has lately arisen in three actions in the Circuit Court of the city of St. Louis. It has also arisen in several cases in other jurisdictions, and has provoked a contrariety of opinion. It may arise in one of two phases, or both: 1. Where there is a statute, like that of Missouri hereafter set out, which requires the jury to find separately the amount which they award as compensatory damages and the amount which they award as exemplary damages. 2. Upon requests for instructions.

In Missouri there is this peculiar statute: "§ 1. In all actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered. § 2. In all actions wherein such damages are recoverable and are allowed by the jury, the amount thereof shall be separately stated in the verdict." <sup>1</sup>

In a libel suit in the Circuit Court of the city of St. Louis, before Judge Talty, there were two counts in the petition, and the jury brought in a verdict of \$1.00 as compensatory damages under each count and \$125.00 as exemplary damages under each count. A motion was made to set aside so much of the verdict as found exemplary damages, and to render judgment for so much of it as awarded nominal damages only. After careful consideration, the learned judge overruled this motion, agreeing with counsel for defendant, upon the authorities cited in their brief, that a verdict which contains two parts, not interdependent but severable, may be separated, and so much of it as may be illegal may be rejected and judgment entered in conformity with so much of it as is legal. But at the same time he took the view that exemplary damages can be bottomed upon nominal damages, and overruled the motion on that ground.

<sup>1</sup> Laws Mo. 1895, p. 168.

In another case in another division of the same court, before Judge Klein, the action was for a most atrocious libel against a perfectly honest man holding an important public office. The jury brought in a verdict for one cent as compensatory damages and \$1,000.00 as exemplary damages. A motion for new trial in this case was overruled, and an appeal will be taken.

In a third case, in still another division of the same court, before Judge Spencer, which was an action for a libel, an instruction was requested by the defendant to the effect that exemplary damages could not be given unless the jury should find that the plaintiff was entitled to more than nominal damages by way of compensation, but was refused by the court under the view that it did not express the law.

A large number of actions for libel are still pending against different newspapers in the city of St. Louis; and hence, under the peculiar statute of Missouri above set out, this question assumes no little importance; and it is not without importance in those jurisdictions where there is no such statute. The question whether exemplary damages can be founded upon nominal damages does not appear to have been definitely settled in Missouri, and a search in the books of reports of other jurisdictions discloses the conflict of opinion already hinted at. The authorities cited in the margin affirm the proposition that exemplary damages can not be given except as an incident to the giving of substantial damages.<sup>1</sup> It is said by the Supreme Court of Texas "that a verdict for exemplary damages under a petition claiming both actual and exemplary damages, cannot be sustained, without a verdict for actual damages also."<sup>2</sup> There are, at the same time, some authorities to the contrary.<sup>3</sup> But these for the most part would seem not to have been well

<sup>1</sup> 1 Sutherland on Damages, § 406 and cases cited; *Girard v. Moore*, 86 Tex. 675; s. c. 26 S. W. Rep. 945; affirming s. c. 24 S. W. Rep. 652; *Stacy v. Portland Publishing Co.*, 68 Me. 279; *Gregory v. Coleman* (Tex. Civ. App.), 22 S. W. Rep. 18.

<sup>2</sup> *Jones v. Matthews*, 75 Tex. 1; s. c. 12 S. W. Rep. 823. See also *Kuhn v.*

*Chicago &c. R. Co.*, 74 Ia. 137; s. c. 37 N. W. Rep. 116.

<sup>3</sup> *Alabama &c. R. Co. v. Sellers*, 98 Ala. 9; s. c., 9 S. W. Rep. 375; *Wilson v. Vaughn*, 28 Fed. Rep. 329; *Hefley v. Baker*, 19 Kan. 9; *Ritz v. Austin*, 1 Tex. Civ. App. 145; s. c. 10 S. W. 1029, 1081.

considered. The case of *Wilson v. Vaughn*,<sup>1</sup> was a mere charge to the jury by a Federal District judge in Kansas. In the case of *Hefle v. Baker*,<sup>2</sup> the Supreme Court of Kansas, speaking through Judge Valentine, do indeed lay down and apply the doctrine that a party can recover exemplary damages without recovering substantial compensatory damages. But in a subsequent case, the same court corrects itself and puts itself in a line with the best authorities, by using the following language: "Exemplary damages can never constitute the basis of a cause of action. They are never more than incidents of some cause of action for real substantial damages suffered by the plaintiff; and when given, they are given only in addition to the real and actual damages suffered and recovered by him."<sup>3</sup> The case of *Paterson v. Dakin*,<sup>4</sup> which seems to have been quoted on both sides of this question, was a libel in admiralty heard before Federal District Judge Toulmin. In one part of his opinion the learned judge says that if the master should refuse to sign a proper bill of lading, "vexatiously, and set up an unfounded claim to demurrage, to inconvenience and damage libellants, then I think appellant would be entitled to vindictive damages, whether any actual damage was proved or not." But in the same paragraph he finds that there was no evidence before him warranting him to find vindictive damages, and he concludes his observations on that subject thus: "I therefore find no just claim for vindictive or exemplary damages; and, *as no actual damages have been proven*, none can be awarded in any aspect of the case."<sup>5</sup>

The question whether exemplary damages can be bottomed upon nominal damages, came before the St. Louis Court of Appeals last year in the case of *Favorite v. Cottrill*,<sup>6</sup> but was left by the court undecided, though the court did decide that in the state of the pleadings and evidence, a verdict for exemplary damages bottomed upon nominal damages merely, would not be disturbed. The verdict was for \$1.00 as compensatory damages and \$5,000 as exemplary damages. Judge Biggs, speaking

<sup>1</sup> *Supra*.

<sup>4</sup> 31 Fed. Rep. 682.

<sup>2</sup> *Supra*.

<sup>5</sup> *Paterson v. Dakin*, 31 Fed. Rep.

<sup>3</sup> *Schippell v. Morton*, 38 Kan. 567; 682, 685.  
s. c. 15 Pac. Rep. 1404.

62 Mo. App. 119.

for the court, after saying that the authorities are not uniform on the question, and after quoting from a leading case in favor of the proposition now contended for,<sup>1</sup> says: "The question is one concerning which much may be said on both sides. It is not necessary, however, for us to determine which is in our opinion the better rule, for the reason that the facts of the case here do not bring it within the reasoning of the decision in *Stacy v. Publishing Co.*<sup>2</sup> Here the injury inflicted was not theoretical or fanciful, but quite substantial, and the plaintiff was only precluded from recovering substantial damages because of the state of the pleadings. We will, therefore, overrule the assignment."

Looking at the question on principle, the writer admits that his mind may have acquired a bias from having had to deal with it professionally; but nevertheless he can not bring his mind to grasp any sound theory upon which exemplary damages can be given, where the plaintiff has suffered no actual damages. Nominal damages, it must be recalled, are given where there has been merely a technical violation of a legal right, and where the plaintiff has suffered no real damage. Such damages, under a technical rule of law, carry costs merely, and in some jurisdictions do not even carry costs. Exemplary damages, it must also be recalled, are given by way of punishment and public example merely. It is true that the fine goes to the plaintiff, and not into the public treasury. But the theory on which those damages are given is simply the theory of punishment and public example. The giving of such damages in any case is admitted to be an anomaly in legal procedure. It imports into civil actions a segment of the criminal law. The doctrine that such damages could be given at all was ably resisted by many juridical thinkers, including Professor Greenleaf. It was denied in the new State of Washington, though we believe that the judiciary rule on the subject has there been changed by statute. Nominal damages being then no damages at all, and exemplary damages being a mere pecuniary fine or mulct, given by way of public example, but recoverable in a civil action,—upon what principle can

<sup>1</sup> *Stacy v. Portland Pub. Co.*, 68 Me. 279.

<sup>2</sup> *Supra*.

the latter kind of damages be bottomed upon the former? Upon what principle can a purely civil proceeding be turned into a purely criminal proceeding, but without indictment or information, in this way? Upon what principle of justice can A. recover damages from B. for doing something which has not inflicted any damage upon A. at all? These questions seem to present the kernel of the subject, and it is difficult to see how they can be answered in the affirmative.

SEYMOUR D. THOMPSON.

ST. LOUIS.

## NOTES.

"CRITICISM," says Lord Halsbury, "is the salt of the administration of justice." We should spoil this if we added one word of comment.—*Law Times* (London).

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AMENITIES OF LEGAL JOURNALISM.—The *Barrister*, of Toronto, having republished something from the *American Lawyer* without credit, "hastens to make the *amende honorable*" under the caption,— "Give the Devil his Due."

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CAN ELECTRICITY BE STOLEN.—The *Electric Review*, says an exchange, credits a German court with an extraordinary decision to the effect that electricity cannot be stolen. The charge was that the accused had tapped an electric light company's main, and stolen several thousand amperes of electricity, which he had used to run a motor; and the court, on appeal, held that in Germany "only a movable material object" could be stolen, and consequently the accused was acquitted.

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THE AMERICAN BAR ASSOCIATION.—We again remind our learned readers that this powerful and influential body will hold its summer meeting at Cleveland, Ohio, in August next. We are glad to note that a suggestion of ours concerning it has found a response in a leading Eastern periodical. The *Albany Law Journal* says:—

We entirely agree with the suggestion of the AMERICAN LAW REVIEW that "a winter meeting at Jacksonville, Atlanta, New Orleans or Galveston, and an occasional migratory meeting on the Pacific coast, would make the American Bar Association more nearly a national body, and less an Eastern body, than it now is."

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LIABILITY OF A RESTAURANT-KEEPER FOR REFUSING TO SERVE UN-ESCORTED LADY GUESTS.—Our distinguished contributor, Mrs. Clara Foltz, the New York attorney, recently had an unpleasant experience in a New York restaurant. Returning from some evening function with her daughter, she stepped into a restaurant to get something to eat, and was coldly refused, on the ground that the keeper of the restaurant had

established a rule to serve no female customers unaccompanied by male escorts after 9:30 p. m. No amount of protestations on the part of Mrs. Folts served to melt the obduracy of the boniface, and she determined to vindicate the dignity of womanhood by suing him for \$5,000.00 damages. The question for decision will be whether the rule in question was a reasonable one, necessary to keep the place respectable, and it will possibly appear to have been such.

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**LAY JUDGES IN NEW JERSEY.**—The legislature of New Jersey, by an act passed on the 31st of March, 1896, abolished the anomaly of having lay judges of their courts, even those of the highest jurisdiction. But the lay judges died hard. Not being lawyers, they took the view that they had a vested right in their offices; that their appointments to those offices were in the nature of contracts protected by the Federal constitution. They did not seem to understand that the contrary has been held in season and out of season, both in State and Federal courts, in regard to all sorts of public offices. The lay of the last lay judges, far more pathetic than the lay of the last minstrel, did not commend itself to the ears of the Supreme Court of New Jersey; and its only result has been to demonstrate, if it needed demonstration, their unfitness for the duties of administering the law.

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**PREVENTING NEWSPAPERS FROM PUBLISHING PORTRAITS OF PERSONS WITHOUT THEIR CONSENT.**—A bill was introduced in the legislature of New York by Senator Ellsworth, to prevent the publication of portraits or attempted portraits of individuals without their consent. We believe that it failed of its passage. The lay press was generally opposed to it, but the *New York Law Journal* said that it aimed at a very desirable reform. It would seem that the common law of libel should be, in a proper state of public opinion, sufficient to reach the outrage of publishing caricatures of public men, such as those of Mr. Hanna, who is dished up in the Democratic newspapers every day in the most offensive style, in portraits bearing no real resemblance to the man. Nothing can be more scurrilous and scurvy than much of the American newspaper press. It reflects the lowest phases of American character. It caters to the widest number of individuals, and they are the lowest.

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“GENTLEMEN OF THE BAR, PLEASE RISE.”—In the Federal courts everywhere, so far as we know, when the judge enters the court to



begin the session, the members of the bar face the court and rise. In France there is even more ceremony. The members of the bar bow to the judges, and the latter return the salutation before taking their seats. In the State courts in Missouri, including even the Supreme Court, no attention is paid to the judges when they come in; the members of the bar remain seated in all sorts of positions, sometimes with their sides or backs to the bench. This is especially the case in the different departments of the St. Louis Circuit Court. In Room No. 5 the members of the bar would not feel at liberty to rise, even if they thought good manners required it to be done; since in that room, when the judge approaches his desk, the sheriff orders all persons in the room to find seats. In the other court rooms a few of the members of the bar have the decency to rise when the judge comes in. It is no more than a proper measure of respect exhibited to the representative of public justice. Brethren of the St. Louis bar: we claim to be gentlemen; let us show that we are such by our demeanor to the judges in the court room.

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**DEFEAT OF THE ARBITRATION TREATY.**—The treaty of general arbitration between this country and England, involving the principle of submitting international disputes to judicial determination, which had been laboriously formulated by our Secretary of State, Mr. Olney, and the British Minister at Washington, Sir Julian Pauncefoot,<sup>1</sup> after being considerably amended by the American Senate, was finally defeated of ratification in that body, lacking four votes of the necessary two-thirds. Without doubt, the defeat of this promising experiment is the subject of very considerable regret on the part of a large portion of the more intelligent among the American people. This regret would, however, have been much more intense and wide-spread had the defeat of the treaty taken place three months earlier. The position of England in the concert of the Powers, a position destitute of morality, religion, justice, humanity, honor, or even decency,—a position that gave the lie to her pretense of Christianity, that spat in the very face of Christ,—has reconciled us to the fact that we have not been drawn into a closer intimacy with her.

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**GOVERNMENT OWNERSHIP OF THE PACIFIC RAILROADS.**—President Fish, of the Illinois Central Railroad, has proposed that the government acquire title to the Union Pacific and Central Pacific

<sup>1</sup> See the text of the treaty, 31 Am. Law Rev. 119, *et seq.*

Railroads by foreclosing its lien thereon, and that it operate that great central highway as a public highway from the Missouri river to the Pacific Ocean, giving all connecting railroads equal rights thereon. Oddly enough, the proposition meets with some favor among the conservative classes, even in the East. It seems that a railroad thus operated is not a novelty, even in this country. The New York and Long Branch Railroad has no rolling stock of its own, but is used as a highway for the trains of the Pennsylvania, the Reading, and the Jersey Central Railroads. The plan seems decidedly preferable to the plan of the late administration, which was to close out the claim of the government against the Union Pacific Railroad to a Vanderbilt syndicate at sixty-five cents on the dollar. There is nothing new in government ownership of railroads, except in the United States. But it is supposed that our system of government is so weak that it cannot own and operate a great interstate highway. What the Germans, the Austria-Hungarians and the Australasian provinces succeed easily in doing, we, with our boasted government, cannot do. The true reason is that private corporations of all kinds have their rings in the noses of our public agents and officials, and that our government is a collection of private corporations in reality, and a union of sovereign States only in form.

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**SALARIES OF FEDERAL JUDGES.**—The *National Corporation Reporter* (Chicago), commenting upon our remarks in favor of increasing the salaries of the United States District Judges,<sup>1</sup> says: "The salary of \$5,000 a year is totally insufficient for the character and quantity of work required of them. They are at present subject to judicial service in three courts: 1. The District Court. 2. The Circuit Court. 3. The Circuit Court of Appeals. Ability and learning of a high order are required to fill these positions with satisfaction to the bar. American legislators have not, except in rare instances, done justice to their judicial establishments." Not long since one of the leaders of the bar of Missouri was, without his solicitation and much to his surprise, appointed to the office of United States District Judge for the Eastern District of Missouri. Having a considerable family to support and educate, he had not laid up much of an estate, large as his practice had been. After holding the office for a short time, he found it necessary to resign it, because of the insufficiency of the salary. He was succeeded by another lawyer of exceptional learning and ability who

<sup>1</sup> 31 Am. Law Rev. 118.

had served a term upon the circuit bench of the State of Missouri, who fortunately had a competency and had no children to educate. The latter still holds the office, whose duties he discharges with great ability and to the entire satisfaction of the bar. It is to be hoped that he will remain on the bench, although the salary is a meager compensation for the services demanded.

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**MORE TIME FOR LEGISLATION.**—The American State constitutions which were established or remodeled subsequently to the Civil War, exhibited a marked tendency to limit the duration of legislative sessions. This undoubtedly grew out of the general feeling of terror that pervaded all branches of business in every State, so long as the legislature was in session. A part of the regular work of corrupt legislators was to make raids upon wealthy vested interests for the mere sake of being bought off. Other legislators, poor themselves and representing the poorer classes, promoted such measures out of that feeling of jealousy which the poor always entertain towards the rich. The result was, constitutional provisions curtailing the duration of legislative sessions to periods so short that no useful legislation could be accomplished in the allotted time. In an address delivered before the American Bar Association, David Dudley Field took ground against this constitutional mistake. It has been productive of a crop of hasty and slipshod legislation. The constitution of West Virginia cut the sessions down to forty-five days. A legislative committee on the revision of the constitution is now in session in that State, and there seems to be a disposition on its part to extend the limit of legislative sessions to sixty days. But while it is to be admitted that a short limit is in some respects a check against unwise and corrupt legislation, it is, on the other hand, plain that sixty days is absurdly short. The members do not have much more than the necessary time to get acquainted with each other and with the routine of legislative business before the session is over.

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**NEW DEVELOPMENT IN SPELLING REFORM.**—The *Literary Digest* notes a gain and also a loss in what it calls "spelling reform." The gain lies in the fact that manufacturers are beginning to see the commercial advantages derived from a simplification of our written language. The loss lies in the fact that American publishers are beginning to adopt the English spelling of such words as labor, mold, etc. We may add that the waste lies in the fact that intelligent persons, like the editors of the *Literary Digest*, will twaddle about a "spelling reform" that is to

be wrought out of the impossible attempt to represent forty-three sounds with twenty-six characters. The death of Sir Isaac Pitman, the inventor of that system of shorthand writing called phonography — sound writing — which is now in vogue in all English-speaking countries, draws attention to the fact that he tried to reform a written language by the invention of an alphabet which was absolutely phonetic, in which each sound was represented by a distinct character. With such a system there could be *no spelling*, and consequently no “spelling reform.” There would merely be an analysis of words by separating them into their component sounds. The labor that now exhausts ten or twelve of the choicest years of childhood and youth, of learning to spell our barbarous language, would, with spelling thus dispensed with, be performed in a few weeks. Moreover, the printing of the words of our language in phonetic characters would absolutely determine their pronunciation. This would be a great convenience — an enormous gain — especially in the pronunciation of foreign names. The spelling reform of Sir Isaac Pitman was met with a fanatical bigotry, which proved and illustrated the truth that learning is even more bigoted than ignorance. We recall the fact that one of his followers was rotten-egged in a country schoolhouse in Illinois for the crime of proving that our present system of spelling is fundamentally absurd. The reformation of our language ought not to stop with eliminating from it what is called spelling; but irregular verbs and all other irregularities ought to be rooted out of it. If the babies could make the language, there would be a great deal more sense in it. The little boy that ran to his mother crying, “Tom hit me,” and the little brother that retorted, “he hurt me first,” talked better English than their parents did.

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**DISBARMENT OF AN ATTORNEY.**—In a proceeding instituted by the Bar Association of Massachusetts against Elisha Greenhood, a member of the bar of that State, he was adjudged guilty of deceit, malpractice and gross misconduct, in two separate cases, was permanently disbarred, and his sentence of disbarment has been affirmed by the Supreme Judicial Court. The Court holds that it is not necessary, in pleading charges against a member of the bar, for misconduct, to plead the charges with the particularity required in a criminal case; it is sufficient that an attorney is reasonably and definitely informed of the matters alleged against him. It further holds that the removal of an attorney who has been guilty of deceit, malpractice, or other gross misconduct may be absolute, leaving the removed party to apply to the court for readmission if his offense is of such a kind that, after a lapse

of time, he can satisfy the court that he has become trustworthy. In closing his opinion Mr. Justice Knowlton says: "It is important that the oath of office taken by attorneys on admission to the bar should not be considered and treated by those who take it as an empty form. Nothing in the life of the people more deeply concerns their welfare than the administration of justice in our courts. The high standard of integrity which is prescribed by our constitution and laws for the officers of our courts should be maintained. The removal or suspension of an attorney is necessarily damaging to him, and may even be ruinous. It should only be ordered after careful investigation of the alleged causes for it. But when it appears that one has ceased to regard the principles of morality, and that fidelity to truth and justice, without which the practice of law is mockery, a court should not hesitate to remove him." Mr. Greenwood had talents which, if properly used, would have given him an honorable place in the legal profession. He was for one year the editor of the *Central Law Journal*. He wrote and published a book on Public Policy, which, though containing a good many inaccuracies, collected a large mass of authority which was very useful to judges and practitioners. It has been frequently cited in judicial opinions.

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**THE CAMPAIGN AGAINST DEPARTMENT STORES.**—One of the tendencies of the times in the concentration of business is shown in the springing up of what are known as department stores, that is to say stores which, under one roof, undertake to carry on every species of merchandising. In one large emporium of this description in a neighboring city, you can have your baby checked while you are doing your shopping; and at the other end of the building you can buy a coffin and order a tombstone. Perhaps the entire business is conducted by the same concern; but often particular departments are let out to other adventurers by a contract in the nature of a lease, and the profits of that department are shared between the lessor and the lessee on some basis mutually satisfactory. The development of these immense bazaars has necessarily dealt a heavy blow to the business of the small shopkeepers. Many have been driven out of business, and those who have managed to eke out an existence naturally entertain sentiments anything but friendly to the department stores. The feeling of a considerable portion of the general public, derived from these retail dealers, is somewhat akin to that which is generally entertained towards trusts and other combinations created for the purpose of stifling competition and maintaining prices. The strength of this feeling was shown in a

striking way in the recent municipal campaign in Chicago, where the Republican party made hostility to department stores a plank of its platform. This may have been one of the causes which led to the overwhelming defeat of the Republican ticket; it may and it may not. An effort was made by the Illinois legislature preceding the one now in session to get through a licensing scheme under which every merchant would have been compelled to take out a separate license for every class of goods sold by him, so that a department store would have had to pay out so much for licenses that all their profits would have been swallowed up. The campaign has been resumed in the present legislature of that State.

The department store seems to be a natural outgrowth of business conditions, and an attempt to legislate it out of existence seems to be futile—substantially an attempt to change the laws and conditions of business by mere legislative fulminations. If, by any chance, their opponents were able to get their schemes enacted into laws and they got past the Supreme Court, it is quite certain that the deprivation of the convenience which these stores have been to the great body of consumers would lead to a complete revulsion of public opinion, and the prohibitory laws would be wiped out as quickly as the voters could get at them.

It must, however, be allowed that like all improvements, there are objections to the department store. It has decreased the number of independent traders and substituted for them an army of clerks who have nothing to do but to read the tag and wrap up the goods for the customer. He becomes, in short, a corporation slave. It seems, however, that our whole business life is passing into the hands of great corporations, larger and larger in wealth and power, and smaller and smaller in number. What are we going to do about it?

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**PACIFIC BLOCKADE.**—The legality of instituting a blockade in time of peace as a measure of restraint short of war has been frequently questioned, but the precedents tend to show that it is legal, subject to the important qualification that it should only be applied against the vessels of the offending nation, and not against those of third nations,<sup>1</sup> Hall<sup>2</sup> says of the measure: "Pacific blockade, like every other practice, may be abused. But, subject to the limitation that it shall be felt only

<sup>1</sup> Lord Granville to M. Waddington on the Formosa blockade, 1884; and the Greek blockade, 1886.

<sup>2</sup> Third edit., p. 372.

by the blockaded country, it is a convenient practice; it is a mild one in its effects even upon that country, and it may sometimes be of use as a measure of international police, when hostile action would be inappropriate and no action less stringent would be effective." It has proved specially advantageous against weak States. The moral sentiment of civilized nations may be relied upon to prevent its abuse by any one nation; while a still more effective check exists in the fact that the measure is usually put in force by the joint action of several nations rather than by one nation alone.

Greece holds a prominent position in relation to pacific blockade as a means for the settlement of international difficulties, and it appears probable that unless she complies with the demands of the Powers with reference to Crete she may afford another illustration of its application. The first occasion upon which blockade was applied otherwise than between nations at war with one another was in 1827, when the coasts of Greece, which were occupied by Turkish forces, were blockaded by the squadrons of Great Britain, France, and Russia, with the view of coercing Turkey, with whom the blockading nations professed to be at the time still at peace. Again, in 1850, when Greece refused to compensate a British subject for injury to property done by Greek subjects, the Greek ports were blockaded by England, with the somewhat insignificant eventual result that a claim of more than 21,000*l.* was settled by a payment of 150*l.* Thirdly, in order to compel her to abstain from making war upon Turkey, Greece was in 1886 blockaded by the fleets of Great Britain, Austria, Germany, Italy, and Russia, with the result that within little more than a fortnight from the notification and enforcement of the blockade the king of Greece signed a decree to disarm.— *Law Journal* (London).

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BEHIND-THE-DOOR CONFERENCES WITH JUDGES.—Some of the judges of the State courts in St. Louis have the unfortunate practice, common in police courts and better suited to that atmosphere, of holding private conferences with counsel in their chambers outside the regular sessions of the court, touching matters which ought to be heard only in open court, where there is an opportunity for the opposing counsel to listen, and where there is that publicity which it is the aim of the constitution to secure. The practice of some of the country judges is even worse. They not only hold private back-door conferences with lawyers, but when they get the case under advisement they consult with the whole county as to the best way to determine it. The judges of the St. Louis Circuit Court have another practice which is regrettable. It is that,

when they pass upon the requests for instructions in a jury trial, they call the counsel up to the judicial seat and examine the instructions with them, and hold whispered conferences with them. In other jurisdictions, where judicial procedure is better conducted, counsel argue their requests for instructions to the court, and where the judge is in doubt he hears opposing argument. This clears up many questions and prevents the multiplication of new trials. The idea that a jury is prejudiced by hearing these discussions is believed to be a complete fallacy. It is a gross impeachment of the whole system of trial by jury so to suppose. In fact, such a discussion in the presence of the jury, followed by the decision of the judge, is the very best way to enlighten the jury with respect to the law of the case. The lawyer who has prepared his case thoroughly for trial before the jury, drawn his instructions with great care, and studied them upon principle and controlling authority in all their details, must see at what a disadvantage the judge is put in having these instructions handed to him, and being compelled to pass upon them summarily and refuse or give them, as the result of a half hour's examination, without the aid of any brief or argument. With such a system it is difficult to understand how errors can be avoided in any trial presenting any considerable number of difficult legal questions. It should seem that a rule of court ought to be adopted requiring counsel to prepare their instructions a given number of days beforehand, each instruction supported by authorities, and submit them to the opposing counsel, to be returned with his objections, also supported by authorities. They should then go to the judge a sufficient length of time before the commencement of the trial to enable him to examine those authorities, and in case of difficulty he should require argument. Of course, this could not be made to apply to instructions based upon unanticipated states of the evidence. It is idle to reply to this that it involves a waste of public time. It really involves a great saving of public time. It leads to the correct trial of causes, and the consequent diminution of new trials and of appeals. It leads to the speedy termination of lawsuits, and the preventing of that denial of justice which is involved in the delays of litigation. It is true that it would be hard to educate an incompetent bar into such practices; but if the process of education were applied with severity, it would result in driving out the incompetents and leaving the practice of the law where it belongs, in the hands of the competent lawyers.

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**PRIVILEGE OF COUNSEL TO WEEP.**—Although the Tammany judicial organ has gravely taken to task those legal journals which have pub-



ished the following dicta of a judge of the Supreme Court of Tennessee — stating with a grave puritanical severity — all the graver because coming from such a quarter — that such journals exhibit the same tendency towards sensationalism which characterizes the lay press, — yet we are tempted to tell the Tammany editor that he may go to grass, and that we will republish it. In the case of *Ferguson v. Moon*, recently heard before the Supreme Court of Tennessee, the action was for a breach of promise and seduction. It had been assigned as error that counsel for plaintiff in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, “shed tears, and thus unduly excited the passions and sympathies of the jury in favor of the plaintiff, and greatly prejudiced them against defendant.” The court confessed itself unable, after diligent search, to find any direct authority on the point, the conduct of counsel in presenting their cases to juries being a matter which must be necessarily left largely to the ethics of the profession and the discretion of the trial judge. The court concluded:—

No cast-iron rule should be laid down. To do so would result that in many cases clients would be deprived of the privilege of being heard at all by counsel. Tears have always been considered legitimate arguments before the jury, and we know of no power or jurisdiction in the trial judge to check them. It would appear to be one of the natural rights of counsel which no statute or constitution could take away. It is certainly a matter of the highest personal privilege. Indeed, if counsel have tears at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they are indulged in to such excess as to impede, embarrass, or delay the business before the court. In this case the trial judge was not asked to check the tears, and it was, we think, a very proper occasion for their use, and we cannot reverse for this reason; but for other errors indicated the judgment is reversed and cause remanded for a new trial.

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**A MOVEMENT FOR A NON-PARTISAN JUDICIARY.**— We are glad to note a movement in Chicago in behalf of a non-partisan judiciary, which would afford an excellent example to the public of St. Louis, who are still in the backwoods in this respect. A communication was addressed to the fourteen judges of the Superior Courts of record of Cook County, whose terms of office were about to expire, by many hundred members of the Chicago bar, asking them to become non-partisan candidates for re-election. The address also included Hon. Benjamin D. Magruder, a judge of the Supreme Court of Illinois, whose residence is in Chicago. The Executive Committee of the County Central Committee of the Republican party passed a resolution indorsing this

movement and pledging the support of the Republican party of Cook County to the judges thus addressed. The learned judges, some of whom were Democrats and some Republicans, responded, assenting to the call thus made upon them. In their letter of response they said: "We regard these movements as prompted by a desire that the election of judges shall not be a matter of contest, which feeling we believe pervades all parties." The Democratic County Ticket of Cook County deviated a little from the principle of renominating the judges in office. It made up a non-partisan ticket consisting of ten Democrats and six Republicans. It declined to renominate three of the sitting Democratic judges, and did renominate four of the sitting Republican judges. Considerable dissatisfaction has been expressed at this action, and, as we learn from the *National Corporation Reporter*, a movement was started to advocate the election on a non-partisan ticket of the three Democratic judges thus slighted by their own party. It is greatly to be regretted that this feeling does not pervade all parties in St. Louis, and that the initiative in the selection of our judges should be left to the lowest possible public agency, the party boss.

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**NEWSPAPER CONTEMPT OF COURT.**—Occasionally we hear of cases in some American jurisdictions where the editors of newspapers are fined and imprisoned for publishing matters derogatory to the judges, who, in convicting them, sit as judges in their own cases. The unfair criticism by the public press of the judges is a great scandal; but for the judges to take it up, and, in a state of mental heat, to sit in judgment on those who have offended them, is a still greater scandal. The editor of a journal at Cleveland, Ohio, was recently fined \$200.00 and costs, and sentenced to imprisonment for ten days in the county jail for publishing matter derogatory to the character of a judge. Not long afterwards, the editor of a newspaper at Eau Claire, Wis., indulged in criticism of a judge, for which he was sentenced to a term of thirty days in jail. In the former case the editor took an appeal, and in the latter the Supreme Court granted a writ of prohibition. Without knowing the particulars of these controversies, the opinion may be hazarded without much danger that judges who will thus conduct themselves ought to be impeached. The general confidence of the public in their judges will, as a rule, render defamatory matter published concerning them harmless, unless it consists of statements of particular derogatory acts. This will appear by the fact that Horace W. Philbrook, of San Francisco, whose disbarment by the Supreme Court of that State was noticed and commented upon in a former issue of this REVIEW, has recently written, printed and

scattered broadcast a pamphlet of over 200 pages, headed "The Corrupt Judges of the Supreme Court of the State of California," evidently imagining that someone will take pains to read it. We have no idea that it has been read from beginning to end by a single person, except the proofreader.

**LAWYERS OF OLD TIMES.**—Hon. John B. Bradwell, editor of the *Chicago Legal News*, is publishing a series of papers in that most excellent journal, entitled "Lawyers, Judges and Some of My Clients and Friends at Rest in Rose Hill Cemetery." The papers are beautifully illustrated with half-tone engravings understood to have been made by Judge Bradwell himself, and the sketches of deceased lawyers, clients, etc., are replete with interest. Many of them contain gracious and tender tributes to departed friends. Among the engravings we find tombs, monuments, etc., some of which are so beautiful as to remind one of the marble glories of the Campo Santo at Genoa. Among the most beautiful of these is the tomb which affords the last resting-place of Myra Bradwell, the lamented consort of Judge Bradwell, a distinguished, strongly intellectual and most excellent woman, who in the State of Illinois fought and won the battle for the right of woman to be admitted to the bar, and, having been admitted, refused to be enrolled and declined practice, but founded a great legal journal which still at the head of its editorial page bears the legend, "Myra Bradwell, founder and editor for twenty years." On the facade of this tomb in niches are busts of Judge Bradwell and Mrs. Bradwell.

After all, do not these sketches, embodying, as they do, attempts to resist the effacing hand of death,

"And vanquish time and fate,"

carry with them a depressing rather than an enlivening moral? A song, a story, a tradition, prattled even on the lips of children, seems to have in it more of immortality than marble or bronze.

"Pride, bend thine eye from Heaven to thine estate,  
See how the mighty shrink into a song!  
Can volume, pillar, pile preserve the great,  
Or must thou trust tradition's simple tongue,  
When flattery sleeps with thee and history does thee wrong?"

Among other curiosities, we learn from these papers that John Wentworth, the great politician, familiarly known as "Long John," was admitted to the Illinois Bar in 1841. But Judge Bradwell is somewhat in error when he says, referring to "Long John's" popularity with the

farmers, that "there was hardly a farmer in his district to whom he did not annually send an installment of seeds under his frank as a member of Congress." He was continually sending seeds and political documents to Ed. Bump, who was a Democrat, and omitting to send anything to old Ben. Butterfield and old Seymour Thompson, who were Whigs.

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CONTEMPT IN VIOLATING INJUNCTIONS BY PERSONS WHO ARE NOT ENJOINED.— When will people begin to learn that trifling with an injunction is an expensive and dangerous form of amusement? At the best they will have to pay costs; and they run no small risk in addition of finding themselves in Holloway. It is quite a mistaken notion to suppose that a man can safely disregard an injunction because he is not a party to the action in which it was granted, or because he is not expressly named in the order or otherwise included in it. He need not have been present when the injunction was made, or have seen the order itself or a copy of it; as long as he knows of its effect, he disobeys it at his peril. For as appears from the recent decision of the Court of Appeal in *Seaward v. Paterson*, when a man is committed on the ground that he has aided and abetted someone else in a breach of an injunction, the jurisdiction arises from the fact that it is not for the public benefit that the course of justice should be obstructed. Moreover, such a man is clearly guilty of contempt. One of the leading cases on the subject is *Lord Wellesley v. The Earl of Mornington*,<sup>1</sup> which curiously enough, does not seem to be noticed in Mr. Oswald's treatise on "Contempt of Court." There Lord Mornington having been restrained from cutting timber by an injunction which did not extend to his servants and agents, one Batley, his agent, cut timber in breach of the injunction; and Lord Langdale held that Batley might be committed for the contempt though not for the breach. In *Avery v. Andrews*,<sup>2</sup> Mr. Justice Kay observed: "If anybody, though not a person actually named in the injunction, chooses to step into the place of the man who was named, and to do the act which he was enjoined from doing, he has committed a very gross contempt of this court." And again: "If people are so foolish as to imagine that they can in this way by a ruse avoid and get rid of an order made by this court, it is time that this delusion should be put an end to." That was a case in which trustees of a friendly society, who had been restrained by injunction from distributing certain funds among the members, retired

<sup>1</sup> 11 Beav. 180.

<sup>2</sup> 51 Law J. Rep. Chanc. 414.

from the trusteeship and new trustees were appointed, who being aware of the injunction, proceeded to distribute the funds. It is probable that their "delusion" was "put an end to;" for Mr. Justice Kay committed both sets of trustees.— *Law Journal* (London).

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OUR LEGAL EXCHANGES.—The *University Law Review* (New York), which publication is conducted under the auspices of the legal department of New York University, and which was temporarily suspended on account of the death of its founder and principal editor, Austin Abbott, has resumed publication, and its April number contains an excellent portrait and an appreciative biographical sketch of that distinguished writer. Its leading article is on the subject of an injunction to restrain illegal acts of private corporations. The value of this article is not diminished from the fact that it is extracted from a joint brief of three distinguished lawyers, in an action depending in the chancery court of New Jersey.

The *Chicago Law Journal Weekly*, has been started as the weekly edition of the *Chicago Law Journal*, which is a monthly publication. The object of the change seems to be to gather in a portion of legal advertising which in Chicago seems to be distributed among the *Chicago Legal News*, the *Legal Adviser*, the *Law Bulletin*, the *National Corporation Reporter*, and this paper. It is furnished at \$2.50 a year, is printed on a linotype, and is a fairly good paper of its class. The editor of the *Chicago Law Journal*, Hon. John Gibbons, occupies a seat upon the bench of the Superior Court of Cook County, and is one of the judges called upon by the bar and the Republican Committee to stand as a non-partisan candidate for re-election. He is a Republican, though of somewhat advanced views.

On May 1st the *Albany Law Journal* came out in a new dress, with a tinted cover, and presented to its readers twenty-four pages of excellent reading matter. We congratulate that excellent publication on these signs of further improvement, made without waiting for the passage of the Dingley Tariff Bill or for the result of the labors of the Bi-Metallic Commission.

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QUEEN VICTORIA'S SIXTIETH JUBILEE.—The completion of the sixtieth year of the reign of Her Majesty, Victoria, by the Grace of God, Queen of Great Britain and Ireland, Empress of India, Defender of the Faith, etc., etc., will soon take place with great pomp and ceremony. This most exemplary wife, mother and queen was called to the throne when

little more than a child, a girl but seventeen years of age. When the announcement was made to her that she was to become the queen of England, she, in girlish simplicity, began to cry, and said, "I will be good." She has kept her word. During her long and illustrious reign she has been personally good. That her reign has been distinguished by the display of any conspicuous intellectual traits in herself, can not be said. Her book of personal reminiscences — we have forgotten its title — does not indicate any considerable degree of literary capacity, or any strong mentality. She is simply a good, plain, virtuous, high-minded, religious woman, whom accident has placed in an exalted position and deprived of all real power. So far as the government of her realm is concerned, she is a mere figurehead. We recollect that when in 1892, on the occasion of her accepting the resignation of the tory ministry, the *London Gazette* published her statement that she accepted it "with regret," there was a general chorus of disapproval on the part of the press of all parties, of the act of the sovereign in presuming to deliver a public expression which should show a preference between the two political parties. It has been said that the ministers might as well tender their resignations to the statue of Victory in Hyde Park as to the Queen, and receive their seals of office on their knees from the said statue. In the great things which have taken place in her reign, beyond all question the most illustrious reign in English history, the Golden Age of England, the Queen has personally played but little part. Indeed, her lamented consort, Prince Albert, whose interference with political matters was jealously watched and continually criticised, played a really more important part in matters of government than she. The Queen is worshiped very much as we in America worship the "old flag." She is worshiped, not because she is better than thousands upon thousands of the virtuous wives and mothers of England, but simply because she is nominally the chief of the State and theoretically the source of power and fountain of justice. She is admired in this country more because, in her great station, which we regard as the head of English society and as little else, she is a really good and modest woman.

Attempts have been made to signalize her jubilee by inaugurating some important step for the advancement of the institutions of her country. It was attempted to persuade the government to bring in an act of Parliament for the codification of the common and statute law of England,— in other words, a general scheme of codification — a scheme which could only be inaugurated during the reign of Victoria,— for its successful prosecution must require a series of years. The govern-

ment gave serious attention to the subject, but was unable to see its way clear to entering upon it. The sense of the English bar, so far as we have had intimations of it, supports the conclusion of the government, that the project is chimerical.

While the personal conduct of the Queen in her great station has been deserving of the highest praise, it can scarcely be said that that conduct has tended much to mitigate the offensive characteristics of political England. Governed by a woman, and a Christian woman, England has remained the bully and the brute of modern history. She has bombarded cities, sent military expeditions again and again against weak and inoffensive peoples, making conquests of their territory, and she has posed and still poses as the greatest Mohammedan power. The Parliament of Great Britain conferred upon the Queen, during the last government of Lord Beaconsfield, the title of Empress of India. The year of her sixtieth jubilee has been tarnished by the spectacle of an English fleet, after a conference with a Mohammedan official, opening fire upon an army of Christian insurgents fighting to achieve their liberty from their ancient Mohammedan oppressors. The simplest and most obvious suggestion of the people in the United States would be that, as three-fourths of the Cretans are Greeks and Christians and desire to be united to their brethren in Greece, and as the pledges which have been repeatedly made in their behalf by the Sultan have been as repeatedly and brutally violated, they have the right to realize their aspirations by force if they can, and without the interference of European powers. But such a notion never entered the breast of a British statesman of the party in power, and it is to be doubted whether it ever entered the breast of the Queen. In the light of what has taken place during this year, and it is but the sequence of what has taken place through out this century, the title of Defender of the Faith had better be changed to Defender of the Faith of Islam. Hail to Thee, Victoria! Hail to the great Christian Queen! Hail to the great Mohammedan Empress!

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THE LEGAL ASPECT OF THE MAYBRICK CASE.—Hon. Clark Bell, of the New York Bar, editor of the *Medico-Legal Journal*, has published in a late issue of that journal, an article on the legal aspect of the Maybrick case, in which he takes strong ground that the conviction of Mrs. Maybrick was illegal, and that the commutation of her sentence from that of death to that of imprisonment for life, is logically indefensible; and, further, that the British government ought to have taken the course in that case which it has taken in analogous cases,—of granting a full

pardon to the prisoner after serving out a portion of the sentence, say the period of seven years. We have read the paper with interest, but feel bound to say that it has not had any convincing effect upon us. It will be remembered that Mrs. Maybrick, an American woman, was prosecuted at the Liverpool assizes, before the late Mr. Justice Stephen, an eminent legal scholar but an indifferent judge, and convicted of the murder of her husband, by administering poison to him while pretending to nurse him on a bed of sickness. At the time of the trial, Mr. Justice Stephen was unquestionably losing his mental balance. He was soon afterwards induced to resign through the concurrent action of the bench and bar, Lord Chief Justice Coleridge being selected to break the unpleasant news to him that he was not in a mental condition further to discharge the duties of his office. His charge to the jury resembled that of Lord Cockburn in the Tichborne trial. It equaled in severity anything that could have been said by the Crown Counsel, while having, unfortunately, more weight, because coming from the presumably impartial source of the bench. That Mrs. Maybrick was not fairly tried, according to the American standard, is beyond all question, and that her conviction would have been set aside in a properly constituted court of appeal possessing a properly established appellate jurisdiction, is equally clear. But there was not then, and is not now, any such court of appeal for criminal cases in England. But while this is all true, upon the main question of guilt or innocence, the great stress of the struggle in behalf of Mrs. Maybrick, most of which has been carried on by American women, is based upon this theory of the facts,— a theory which the writer of this note, who was in England at the time of this conviction, as Mr. Bell was, knows to have been generally concurred in by the well-informed opinion of that country,— the theory that Mrs. Maybrick was not guilty of her husband's death; for that, whereas she attempted to poison him with arsenic while pretending to nurse him on his death bed, yet he died from other causes, and her attempt fell short of its consummation. It is just this fact which has prevented her pardon. Her case presents simply the case of an adulterous woman desiring to get rid of her husband, attempting to poison him while pretending to nurse him on a bed of sickness, and possibly failing in her attempt from his dying of disease before she succeeded in accomplishing her purpose. The crime which she attempted was of the most atrocious nature. It was known to the ancient common law as *petit treason*. The just view was that the wife owed in a certain sense a sort of allegiance to her husband, and that if she murdered him she became a traitress to that allegiance; and she was pun-



ished for it by burning, and not, as now, by hanging.<sup>1</sup> The accidental circumstance that the attempt was frustrated by his death intervening from some other cause, does not in the slightest degree diminish her moral guilt or render her the less conspicuous a subject for public example. It is not a case which calls for the shedding of maudlin tears. Those who administer the justice of England may be severe. Their judicial procedure may be barbarous, in that the judge acts the part of an advocate for the Crown. It may be indefensible in that there is no court of criminal appeal. But that country is not stained with the enormous annual crop of six or seven thousand murders which disgrace the United States, nor do the lynchings outnumber the legal executions two to one, as in this country. Considering the general inefficiency of our criminal laws and criminal administration, we are in a very poor plight to advise our English brethren what they ought to do.

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**IN WHAT DISTRICT PATENT CASES MAY BE BROUGHT — ALL DOUBT ON THIS SUBJECT REMOVED BY AN ACT OF CONGRESS.**— Both Houses of Congress passed, at the last session, a bill which would have settled, once for all, the uncertainty, and conflict of authority that has existed between the various circuit courts with reference to their jurisdiction over patent cases where the defendant was not an inhabitant of the district in which the alleged acts of infringement occurred. Unfortunately, the act failed to become a law owing to the lateness at which it was sent to the President for his approval, before his time had expired. The bill provides:—

That in suits brought for the infringement of letters-patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.

Section 711 of the Revised Statutes provided that the jurisdiction of the courts of the United States should be exclusive in certain cases and, in subdivision 5 of that section, enumerated patent and copyright cases as included among these. The act of 1887, as corrected by the

<sup>1</sup> She was drawn and burned: 4 Bla. Com. 204. See also 4 Bla. Com. 75.

act of 1888, provided that no civil suit should be brought before the circuit court against any person by any original process or proceeding in any other district than that whereof he was an inhabitant. The question arose, where the defendant had committed acts of infringement in a district of which he was not an inhabitant within the meaning of the acts of 1887-8, whether he could be sued in the district where the alleged acts of infringement had occurred, or whether the complainant would be compelled to sue him in the district of which he was an inhabitant. The inconvenience and, oftentimes, injustice and hardship of being compelled to sue a defendant for an infringement of letters-patent in a district other than where the alleged acts of infringement took place, is plainly apparent. The infringement may take place in California and the defendant, probably some rich and powerful corporation, be an inhabitant of New York, or Massachusetts, or some other distant State. The question gave rise to considerable conflict of opinion. Judge Colt,<sup>1</sup> of the First Circuit; Judge Wallace,<sup>2</sup> of the Second Circuit; Judges Blodgett<sup>3</sup> and Jenkins,<sup>4</sup> of the Seventh Circuit; Judge Thayer<sup>5</sup> and Shiras,<sup>6</sup> of the Eighth Circuit; Judge McKenna,<sup>7</sup> of the Ninth Circuit, held that the circuit courts had no jurisdiction of patent cases unless the defendant sued was an inhabitant of the district, or, in other words, the suit for infringement of letters-patent must be brought in the district of which the defendant was an inhabitant as provided by the acts of 1887-8. This view was based, for the most part, on the ruling of the Supreme Court in *Shaw v. Mining Co.*,<sup>8</sup> which interpreted the acts of 1887-8. On the other hand Judge Wheeler,<sup>9</sup> and Lacombe,<sup>10</sup> of the Second Circuit; Judge Sage,<sup>11</sup> of the Sixth Circuit, and Judge Morrow,<sup>12</sup> of the Ninth Circuit, held that the acts of 1887-8 were inapplicable to patent cases. Their view was based upon certain expressions of opinion

<sup>1</sup> *Nat. Typewriter Co. v. Pope Manuf'tg Co.*, 56 Fed. R. 849; *Donnelly v. U. S. Cordage Co.*, 66 Fed. R. 613; *Gorham Manufacturing Co. v. Watson*, 74 Fed. R. 418.

<sup>2</sup> *Halstead v. Manning, Bowman & Co.*, 34 Fed. R. 565; *Adrairie Platt & Co. v. McCormick Harvesting Mft'g Co.*, 55 Fed. R. 287.

<sup>3</sup> *Preston v. Fire Extinguisher Co.*, 26 Fed. R. 721.

<sup>4</sup> *Bicycle Hepladdet Co. v. Gordon*, 57 Fed. R. 529.

<sup>5</sup> *Reinstadler v. Reeves*, 38 Fed. R. 308.

<sup>6</sup> *McBride v. Grand de Tour Plow Co.*, 40 Fed. R. 162.

<sup>7</sup> *Cramer v. Singer Manufacturing Co.*, 59 Fed. R. 74.

<sup>8</sup> 145 U. S. 446.

<sup>9</sup> *Smith v. Sargent Manufacturing Co.*, 67 Fed. R. 801.

<sup>10</sup> *Nat. Button Wks. v. Wade*, 72 Fed. R. 298.

<sup>11</sup> *Noonan v. Chester Park Athletic Club*, 75 Fed. R. 334.

<sup>12</sup> *Earl v. Southern Pac. Co.*, 75 Fed. R. 699.

by the Supreme Court in *Re Hohorst*,<sup>1</sup> and in *Re Keasbey & Mathison Co.*<sup>2</sup> The latter commends itself to us as being the better and more logical view to take, and we are glad that Congress has adopted it as enunciating the true rule on the subject. Under the bill, suit may be brought in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement, the only limitation being that he shall have a "regular and established place of business" in the district in which the acts are charged to have been committed, which is really a protection to the defendant. We trust that the promoters of the bill will persevere and, if possible, have it passed at the special session. Their efforts have been, and will be, much appreciated by both bench and bar.

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**THE CASE OF SPURGEON YOUNG — DEATH DUE TO HYPNOTISM BY UN-SKILLED AMATEURS.**— An important question, alike of medicine and of law, in other words, a question in the interesting field of medical jurisprudence, arose and received elaborate consideration in the recent autopsy over the body of Spurgeon Young, before the coroner and jury of Chautauqua County, N. Y. The deceased was a colored lad, seventeen years of age, and the scope of the inquiry touching his death, was "how far it was due to, or traceable to his condition, as affected by the repeated placing of the lad in a hypnotic state, by hypnotizers who are not skilled in the matter, and in which, it was thought, that he sustained physical injuries which might have incited the disease of which he died." The expert medical opinions submitted and the conclusions reached are embodied in a paper read before the Medico-Legal Society of New York, on February 20, 1897, by the Hon. Clark Bell, vice-chairman and secretary of the Psychological Section of said society.

The inquiry as to the physical or pathological effects of such hypnotism took the form of a hypothetical question submitted in writing by the coroner to a number of the leading medical jurists of the country. This hypothetical question, which is lengthy, stripped of much of its detail of diagnosis, was whether, "in a case of a youth, seventeen years of age, who had for approximately six months been a chronic 'sensitive subject,' having been protractedly and repeatedly hypnotized many times by amateurs and irresponsible and reckless youthful dabbles in hypnotism,— would physical injury or organic impairment, directly or indirectly, follow from the psychic or emotional disturbances or derange-

<sup>1</sup> 150 U. S. 658.

<sup>2</sup> 160 U. S. 221.

ment of nerve function, involved in or due to, the morbid innervation incident to such hypnotic practice, or experimentation in 'mesmerism' or alleged animal magnetism?"

With one exception, the unanimous voice of the scientists was that such experimentation and hypnotizing is vicious and dangerous. This consensus of expert opinion may be summed up as expressed by the Hon. Thomson Jay Hudson, LL.D., of Washington, the learned author of "The Law of Psychic Phenomena," who is regarded as a high authority in the whole domain of "hypnotic suggestion." In his exhaustive reply he sums up by saying, "In my opinion, there could be but one inevitable result, namely, a shattered nervous organism, leading eventually, if life is prolonged, to imbecility or insanity." He further says, "I have been led to believe that there are few bodily diseases that may not be produced by abnormal, mental and nervous conditions. 'Who will pretend to assert that any tissue of the body is beyond the range of nervous influence?'" Says Prof. W. Xavier Sudduth, that such hypnotic suggestion is "fraught with grave dangers. \* \* \* Those who practice them should be held criminally liable." The distinguished alienist of St. Louis, Dr. Charles H. Hughes, whose repute is world-wide, declares that: "The repeatedly hypnotized subject becomes a more or less changed man as compared with his normal state, and to this extent, is in an insane state of mind with this difference from the ordinarily insane person, that his change of mental character is chiefly subject to the directing influence of another person rather than to his own perverted and abnormal volition, as is the case with the ordinary insane person. But he may become as insane and diseased in brain as an ordinary lunatic." And so say with one accord the whole venire of medico-jurists.

They were of opinion, as expressed by Dr. Buck, that "the practice is harmful under all circumstances except in the hands of skillful physicians for the treatment of disease, and even then in a narrow range of diseases and with doubtful results. In all other cases it is dangerous, and should be suppressed by law and with severe penalties." And so the coroner's jury returned, concluding their verdict: "We would recommend that the State legislature pass a law prohibiting the practice of hypnotism."

There exist in St. Louis empirics who advertise "Hypnotism taught in \* \* \* lessons;" these constitute a public danger and should be subjected to the police power.

JOSEPH WHELESS.

ST. LOUIS.

EUROPE AND THE CRETAN QUESTION.—The eyes of the civilized world are turned with eager interest to what the Germans, with true Oriental fancy, call the "Morgenland,"—the Morning-land, the Orient, where life and civilization, and the arts first dawned,—to historic Greece; and the world-sympathies go out for the gallant Hellenes in their struggle against the barbarous hordes of Islam. It is the broader fight of the Crescent against the Cross, of religion against superstition. The turbaned and bloodthirsty Turk is to-day just what he has been ever since his fanaticism was kindled by visions of the voluptuous Paradise of the Prophet, a—

\* \* \* "Saintly, murderous brood,  
To carnage and the Koran given,  
Who think through unbelievers' blood  
Lies their directest path to heaven;  
One who can pause and kneel unshod  
In the warm blood his hand has poured,  
To mutter o'er some text to God,  
Engraven on his reeking sword;  
Nay, who can coldly note the line,  
The letter of those words divine,  
To which his blade, with searching art  
Has sunk into his victim's heart!"

But aside from the righteous justness of the Greek cause, as it stands established in the forum of the world's conscience, their cause has an equally just standing in the forum of international law. In the light of the established principles of this great jurisprudence, the incongruous attitude of the so-called great Christian powers of Europe towards the combatants is an anomaly which shocks the humane sense of civilization. An important criticism of the unjustifiable attitude of the Great Powers in coercion of Greece and abetting Turkey, from a very high source, has recently come to our notice, and will no doubt be read with much interest in this crisis of the Eastern question.

It is found in a letter from M. Alphonse Rivier, a distinguished diplomat and publicist, being Consul-General of the Swiss Confederation at Brussels, and author of the important volumes "*Principes de Droit des Gens*," which were recently noticed in the book department of the *AMERICAN LAW REVIEW*. Discussing the Cretan question in a letter to Joseph Wheless, Esq., of St. Louis, dated Brussels, April 7th, which was shortly before the war between Greece and Turkey broke out, M. Rivier says:—

I am like yourself of the opinion that the conduct of the great powers constitutes a veritable abuse. Their interference is unjustifiable, and can only be

explained by the inadmissible pretension of giving orders *in the name of Europe* to the small States. Now, they have never received the mandate to represent Europe; and Greece is sovereign as any other sovereign State. The guarantee certainly does not give any sort of suzerainty! At the bottom, the great powers lend their co-operation to the Turkish Government in order to repress the national movement in Crete, and to resist Greece. This is in my opinion an iniquity and a folly. "Quos vult perdere Jupiter dementat." On the other hand, the intervention of Greece in Crete is justified by the law of self-preservation.

In this letter M. Rivier calls attention to a notable article from which we will quote some paragraphs. It is an anonymous contribution, signed "X," in the *Revue de Droit International* of Brussels, 1897, dated March 15. As M. Rivier says, it is by "un homme d'Etat qui doit garder l'anonyme;" and good reason appears for wishing to remain incognito in the severe strictures of this evidently important writer. We translate some extracts from his interesting criticism. His vein is satirical and caustic. He begins by saying: —

Europe, or at least what we are accustomed to call commonly by that name, is decidedly in a way to cover itself with glory. After the bombardment of the Cretan insurgents, the ultimatum to Greece! The six great powers have dictated their orders to Greece: she must retire her troops and her ships from Crete and from the territorial waters of the isle. Europe being unable, in the present crisis, to permit in any case the annexation of Crete to Greece, the island ought to receive, in order to avert a general conflagration, an autonomous organization similar to that of Eastern Roumelia, or of the Principality of Samos. The Greeks must content themselves with that for the moment. A refusal on their part would expose them to measures of constraint which the powers are irrevocably determined to impose.

What would result from this new phase of the Cretan question? What will Greece do? If she is reasonable, she will undoubtedly yield, having already accomplished, by her sole intervention, this result: the complete autonomy of her sister isle.

By a true derision of things here below, it is principally the emperors of Germany and Russia who seem at this moment the chief supporters of the Ottoman empire. Not content with assuring the Sultan Abdul-Hamid of their good will, they have even seen good — and their allies agree with them in that view — to order the hellenic forces to quit Crete at once, but to leave the Turkish troops there until they see fit to invite them also to leave the island. Besides these two protagonists for the defense of the interests of His Ottoman Majesty, what is the attitude of the other powers? It would not be exaggerated to say that, at least so far as concerns Eastern affairs, France is beginning to wear the Russian alliance almost like a shirt of Nessus. Austria, on its part, always hesitates between its own interests in the Orient, the effective measures of coercion which it has always admired, and the inevitable necessity of following, willingly or unwillingly, the Germanic alliance. Italy finds herself between the "devil and the deep blue sea:" on one hand, the Triple Alliance; on the other, the striking similarity of the conditions of her own recently acquired

independence with those existing at this moment in Crete. England wishes indeed to remember somewhat of her conduct at the time of the realization of Italian independence; but, contrary to her inclination, it is true, and without enthusiasm, she takes part all the same in that cacophony which is called the European concert, till the time may be when events will permit her to adopt the policy which she judges best for her own interests.

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D'ANNUNZIO'S TRIUMPH OF DEATH.—The book which is creating the stir of the hour is, as translated into English, called "The Triumph of Death," and is written by a young Italian of a decidedly effeminate appearance named Gabrielle d'Annunzio. This wretched degenerate has succeeded in producing a book sufficiently original to bring upon himself the questionable honor of being called a modern Boccaccio. He has also drawn upon his American publishers the questionable honor of being prosecuted in a Federal court in New York by Anthony Comstock. The learned judges are said to have imitated the example of Lord Eldon when he was asked to enjoin the further publication of Bryon's Cain on the ground that it was an infringement of the plaintiff's copyright. They took the book home and read it, and decided that it was not an obscene publication within the meaning of the act of Congress which prohibits the circulation of such publications through the mails. What is and what is not an obscene publication, is and always must be a question very difficult of solution. Passages in a book may be obscene, in a sense; page after page of it may be obscene; this can be affirmed of Boccaccio, Shakespeare, and even the Bible; and yet, whether it is in general a work of such obscenity as to fall within the inhibition of the statute must depend upon the scope and tenor of the whole work. Many medical and surgical works, together with their engravings, are necessarily obscene. They expose those parts of the human body which prudery has characterized as obscene, to the most minute observation and analysis. They could not lie upon any parlor table. No one would desire his young daughter to read them. And yet they can not be denounced as obscene within the meaning of such a statute, because their general tendency and purpose are to advance human knowledge and to mitigate the sufferings of the human race. It would be futile to denounce the Bible as an obscene work, because passages from it, taken by themselves, are obscene. We recall the fact that that erratic individual, George Francis Train, made a collection of these passages and published them in a separate pamphlet and distributed this pamphlet through the mails, for which offense he was prosecuted—and we believe successfully,—either under the State or

the Federal law. Torn from their context, stripped of the general purpose of the book of which they formed a part, they might well be regarded as obscene literature. In the same sense Shakespeare is obscene. Some of the passages in *Macbeth* and in the *Merchant of Venice*, which no doubt made Queen Elizabeth and the ladies of her court shake with laughter when they were enacted on the mimic stage, cannot be enacted in any American theater at the present day. The writings of Boccaccio, if they were modern, would unquestionably be tabooed as obscene literature, and would not be permitted to circulate through the mails. But their obscenity is invested with a hoary antiquity and the stench is mellowed down by the eremacausis of ages, just as old wine and even old cheese will in time lose their flavor. The same may be said of Rabelais, the very Limburg cheese of literature, whose filth, united with the most infinite wit, has kept all France, and much of the outside world, roaring with laughter for three hundred years. No one could now write, print and circulate anything comparable in filth and coarseness to the history of *Pantagruel*.

D'Annunzio's work is not comparable with any of these. It is hard to find language in which to describe it. It is destitute of any trace of morality or decency. It is not the description of comical situations attended with filth. It is the cold, hard, colorless, abominable, intense overdescription of filth itself, the description of it because it is filth. In this way the wretched degenerate deals both with moral and physical filth. He belongs to what we believe is termed the Realistic School of modern art and literature. Zola seems to be the great representative of that school, and will continue to be unless d'Annunzio wrests the scepter from him. There is a Realistic School in painting, affected chiefly by the French, who, of all others, seem to delight in filthy sights and smells. The old classic painters delighted in lofty scenes and lofty situations. The modern French painter loves to paint a goose pasture or a pigsty. Nay, if he could rake out the contents of the sty into a heap in the sunshine and paint that accurately, he would regard the result as the highest achievement of art. Such is d'Annunzio. It would be a compliment to him to call him a moral idiot. He is a moral pervert of the most pronounced character. The reading of his book makes one feel that he has spent days and nights in a charnel house. He gives one a reverence for the Old System. It would convert an atheist into a Christian. It shows man the immense superiority of the Old System, founded albeit on a now tottering faith, to the modern realism, which delights in the dissection of putrid corpses. The difference between the two systems is that the realistic painter or writer



sees in man only a putrid corpse filled with maggots, and, under the microscope which he turns upon it, full of armies of contending microbes and emitting a volume of unendurable stench. The believer in the Old System, on the other hand, never lost sight of the dignity of man. Voltaire, Paine and Diderot did not go so far. All of them left man in the possession of the dignity of an immortal soul.

Such are the impressions of a not over-fastidious man who plugged up his nose and filed his mind, through a succession of evenings, to the reading of d'Annunzio's abominable book, until, with unspeakable thankfulness, he at last succeeded in reaching the end of it.

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OBITUARY OF THE PROFESSION.—*Matthew Hale*, an old and distinguished lawyer of the State of New York, died recently at his home in Albany. He had been president of the New York State Bar Association, and was a candidate on the Republican ticket for the Supreme Bench of that State, but was defeated by Hon. Rufus W. Peckham, now a justice of the Supreme Court of the United States.

*J. J. Storrow*, of Boston, distinguished as a patent lawyer and recently counsel for the government before the Advisory Commission appointed by President Cleveland with reference to the disputed Venezuela boundary, died suddenly on April 15th, in the new Congressional Library at Washington. He was on his way to Florida with his family, whom he left at Fortress Monroe while going to Washington on business before the Supreme Court.

Hon. *Daniel W. Voorhees*, who died recently in Washington, D. C., was for many years a senator of the United States for the State of Indiana. He was better known as a politician than as a lawyer, though he was distinguished in his profession. His distinction lay, however, in his power as an advocate, rather than in the extent and depth of his learning. He was counsel for the defense in many notable murder trials. He defended the late Wm. McKee in the United States Circuit Court at St. Louis in 1876, against a prosecution for membership in the conspiracy known as "the Whisky Ring." His defense of his client, though powerful, was unsuccessful. But his efforts did serve to secure a mitigation of the sentence to six months in the county jail, which sentence was served out.

The death of *Stewart Rapalje*, which took place some months ago, calls attention to the life of one of the busiest workers in legal authorship and journalism. A brief summary of his career would not

at all do justice to it; and yet we have not space for more. Born in 1843 in the city of New York; entering Yale College in 1861, but not graduating; studying law under Prof. Dwight in the law School of Columbia College; becoming a member of the bar of San Francisco; assisting the late Benjamin Vaughn Abbott in scrambling together that very imperfect and almost reprehensible work, the United States Digest, New Series, where Mr. Rapalje picked up the excellencies and learned to avoid the faults of his tutor; compiling many digests, the most notable of which were Rapalje and Mack's Digest of Railway Decisions and Rapalje's Digest of the American decisions and American Reports; writing treatises on several topics in the law; editing the *Criminal Law Magazine* for a considerable time; editing reprints and reports; contributing numerous articles to the legal periodicals, including the *AMERICAN LAW REVIEW*;—altogether no modern lawwriter, unless it be Austin Abbott, has surpassed him in diligence and in the amount of work turned out. With regard to the quality of his work, it may fairly be said that, while he does not seem to have been possessed of a very strong individuality, he generally steered clear of mistakes, stated legal doctrines clearly and correctly, and was a good, useful and helpful digester and writer upon the law. We may conjecture that he died from overwork; from the long wear and tear of being, in the better sense of the word, a bookseller's hack. We may follow him through a life of which we can imagine the chief incidents were the law bookseller, sitting astraddle of his neck, brandishing a club, putting spurs into his sides, and continually shouting, "Copy! Copy!" We can see the law bookseller getting rich, or at least thriving, on the earnings of Mr. Rapalje, while the latter was continually in hot water, scarcely able to make ends meet and support his wife and several children.

The lawyers are a parasitic class. They do not create anything except law, but thrive upon the contentions, calamities and miseries of their fellow-men. The law booksellers form a second class of parasites, which might properly be denominated *Acarians*, who fasten themselves to the bodies of the lawyers, as the members of the genus *discopoma* fasten themselves to the helpless ants and suck out their life's blood. The digesters, authors, etc., are a class of creatures still further subordinate. Their status in the scale is so low that they are even the slaves of the *Acarians*. Their lives are generally short, like those of Proffatt, Bump and Rapalje, not to mention the famous author of Smith's Leading Cases. But they live long enough. Their lives consist of days of unending toil, fatigue and misery. Death usually comes to

them as a grateful release. Meantime, their bookselling masters thrive. They often have estates in the country. One of them sports his yacht and with it the title of *commodore*. Another has the enormous cheek to hold himself out as the *author* of an alleged cyclopedia — partly written by others and partly stolen — which consists entirely of the labor of lawyers, the publisher himself not being a lawyer at all.

“ So let the stricken deer go weep,  
The hart ungalled play;  
For some must work and some must sleep,  
So runs the world away.”

If Mr. Rapalje had from the start confined himself to the legitimate practice of his profession, he would have grown in that practice, established a large and excellent clientele, founded a large income, lived many years longer, and left, if not a name, more money for his family.

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“ *IN RE BEACH ON RECEIVERS.* ”—This is the title of a printed circular letter which purports to be issued from the “ Offices of Charles F. Beach, Jr., 7 and 8 Great Winchester Street, London, E. C.” under date of March 1st, 1897, a copy of which came to us mailed from a small town in Ohio. It is addressed “ My Dear Sir,” and begins by informing the Dear Sir that the writer of the letter has learned that a second edition “ of my work on Receivers ” is about to be issued and that he is led to believe that the publishers will advertise and sell it in a way which may reflect on him, and which, under the circumstances, will, if he is silent, inevitably impose upon the profession. It would be unjustifiable consumption of our space and a cruel assault upon the patience of our readers to set out this circular in detail. When it is read in the light of facts which are well known it is to be very much regretted. It calls the new edition of *Beach on Receivers*, already noticed in the *AMERICAN LAW REVIEW*, “ a little short of libellous to be put out as *Beach on Receivers* ; ” and he winds up by calling it “ the impending bastard second edition of my *Receivers*. ” Although the author of this choice circular had not seen a copy of the new edition, against which he inveighs, he had been advised that the editor “ has interpolated here and there throughout my text a quantity of agrarian or communistic nonsense in reference to corporations and combinations of capital, for which I would on no account consent to be held responsible. ” And he says of this second edition: “ It will be a fraud, and will tend to

deceive and trick those who are induced to buy it." Now, the fact is that the first edition of this work was for the most part written by a gentleman now associated with Judge Dillon. We have taken pains to ascertain just what part of the work which Mr. Beach in this circular calls "My Receivers," the gentleman referred to did write, and we find that he wrote all of chapters 2, 3, 4, 5, 8, 9, 10, 18, 19 and 20, and nearly all of chapters 1 and 6, and that he did some work on most, if not all of the other chapters. In view of this fact, it does seem like a piece of joyous assurance in Mr. Beach to call the work "*my Receivers.*" The publishers of the book were L. K. Strouse & Co. They had bought the copyright of Mr. Beach; in fact, he has never had any right, title or interest in the copyright since the book was published. L. K. Strouse & Co. became consolidated with Baker, Voorhis & Co., and in that way the copyright passed to Baker, Voorhis & Co. When they determined to get out a new edition they employed Mr. Alderson, of Missouri, a very competent lawyer, experienced as a legal author, and a practitioner for seventeen years, to do the work. In a circular which they have written in reply to the circular of Mr. Beach, they make it clear why they did not employ him to do it. After he had sold out his rights to them and had gone to London, he tried to hold them up for more money. He wanted them to send him a draft for "\$250, i. e., 50 odd pounds as it may figure out," for which he would withdraw any opposition to their getting out a new edition. He added: "You can then issue it in my name, or in my name with that of an editor, or leave my name off entirely — do anything you want to, in any way you like. \* \* \* Is not this better than a quarrel?" No reply was made to this impudent demand, and it was renewed at a later date without any notice being taken of it. The publishers, aside from other reasons for declining to employ Mr. Beach to make the new edition, say that, "we would have been unwilling to have him undertake the preparation of it for us, for the reason that we felt he would not do the work himself, but would employ some one whose ability to do the work, and whose honesty and conscientiousness in performing it, we might know nothing about." Messrs. Baker, Voorhis & Co., deal very caustically with their would-be and quondam pretended author. They traverse some of his statements; they regret that they have been drawn into a controversy with him; they say that he is the only author with whom their house, in its very long dealings with authors, has ever had a serious controversy; and they demolish him by stating that the entire law book trade have at last come to know his methods, to understand his true character, and value him at his real worth. "His circu-

lar," say they, "has been received with indignation and profound contempt by the trade, of which we have received ample evidence since its issue." Mr. Beach has seen fit to raise a public controversy with one of his publishers, to make public what should have remained a private matter; and if he has thereby brought to the attention of the profession the manner in which most of his works have been written, it is his own fault.

## NOTES OF RECENT DECISIONS.

**TRUSTS INTERFERING WITH INTERSTATE COMMERCE: DECISION OF THE SUPREME COURT OF THE UNITED STATES ON THE SUBJECT OF RAILWAY POOLING.**—The Supreme Court of the United States in the case of *Trans-Missouri Freight Association*<sup>1</sup> decides, by a bare majority of the court, five to four, that the Federal Act of 1890, known as the Sherman Anti-trust Law, applies to railroad companies, and renders void a contract among a number of railroads to establish and maintain a uniform scale of tariffs. The opinion of the majority is written by Mr. Justice Peckham (with whom concurred the Chief Justice, and Justices Harlan, Brewer and Brown); and the dissenting opinion is written by Mr. Justice White (with whom concurred Justices Field, Gray and Shiras). No proper exposition of the opinion, or of the dissenting opinion, can be given in a brief note. The principal difference between the views of the concurring and dissenting judges seems to be that the concurring judges hold that the act means what it says, and that it invalidates any contract which results in creating a combination or a concert of action which prevents a lowering of rates among interstate carriers, while the dissenting judges hold that the statute ought to be read with reference to the surrounding principles of general jurisprudence,—that it ought to be viewed like a jewel in its setting or like a picture in its frame,—and that it ought to be held as invalidating only arrangements of the kind in question when they are unreasonable, or when they operate unreasonably to restrain trade and impair competition. In other words, as we understand the view of the minority, it is only when an arrangement of this kind results in maintaining unreasonable rates of transportation, that the statute applies. The statute says that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal. The opinion of the majority of the court makes the statute mean simply what it says. The determining consideration in deciding whether a case falls within it or without it, is that it is in restraint of trade or commerce among the several States or with foreign nations.

<sup>1</sup> *United States v. Trans-Missouri Freight Association*, 17 Sup. Ct. 540; 58 Fed. Rep. 55.

But the minority would interpolate into the statute the word "unreasonable," so as to make it "any unreasonable restraint of trade or commerce," etc., and the question whether or not the restraint were unreasonable would, of course, be a judicial question. Congress had the right to say, and it did say, that every contract or combination having the end in view of restraining interstate or foreign commerce, should be held unreasonable, thus taking this question away from the judicial courts. The fallacy of the dissenting opinion is shown by the first proposition with which Mr. Justice White starts out; that only such contracts as unreasonably restrain trade are violative of the general law. He forgets that he is not dealing with the general law, but with the statute law, and that, within constitutional limits, it is always competent for the legislature to repeal or modify the general law. The following extract shows his cloudy and inconsequential mode of reasoning: —

The theory upon which the contract is held to be illegal is that, even though it be reasonable, and hence valid under the general principles of law, it is yet void, because it conflicts with the act of Congress already referred to. Now, at the outset, it is necessary to understand the full import of this conclusion. As it is conceded that the contract does not unreasonably restrain trade, and that if it does not so unreasonably restrain, it is valid under the general law, the decision, substantially, is that the act of Congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts. But this proposition, I submit, is tantamount to an assertion that the act of Congress is itself unreasonable. The difficulty of meeting, by reasoning, a premise of this nature is frankly conceded; for, of course, where the fundamental proposition upon which the whole contention rests is that the act of Congress is unreasonable, it would seem conducive to no useful purpose to invoke reason as applicable to and controlling the construction of a statute which is admitted to be beyond the pale of reason. The question, then, is, is the act of Congress relied on to be so interpreted as to give it a reasonable meaning, or is it to be construed as being unreasonable and as violative of the elementary principles of justice?

But aside from that, this is a penal statute, and such statutes, of all others, must be certain. But how absurd it would have been if Congress, instead of the plain words above recited, had enacted that "every contract, etc, in the unreasonable restraint of trade or commerce, etc., shall be illegal," etc., then following with penal sanctions, — making the forbidden act a crime or not a crime, accordingly as some judge might *subsequently* decide it to have been reasonable or unreasonable!

If this is the correct interpretation of the statute, it might further be asked, why was it enacted at all? If it is to be restrained to mean

what the common law already meant, or what the so-called "general jurisprudence" of the Federal courts means, why enact it at all? Why did not Congress allow the subject to be governed by that common law or by that jurisprudence? Was it merely to add a penal sanction to what was already forbidden by the principles of the common law? The majority of the court seem to have taken the obviously sensible view of the question,— that the statute means exactly what it says, and that it is not for the judicial courts to amend it by saying that it shall be applied only where the application of it would lead to results which those courts deem reasonable. Upon this feature of the case, the opinion of Mr. Justice Peckham contains the following observations:—

The claim that one company has the right to charge reasonable rates and that therefore it has the right to enter into a combination with competing roads to maintain such rates cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition, the extent of the charge for the service will be seriously affected by the fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up competition is allowed no play; it is shut out and rate is practically fixed by the companies themselves by virtue of the agreement so long as they abide by it.

The predictions which were made of the dire consequences which would follow the decision have not so far been realized. The earth has continued to turn on its axis, the tides have continued to ebb and flow, and the railroads have continued their operations as before. The opinion does not pass upon the constitutionality of the statute. A pamphlet has been written upon this subject by Mr. Guthrie of the New York bar, which will be published in the June number of the *Harvard Law Review*. We have read that pamphlet with interest. It takes strong grounds against the constitutionality of the Sherman Anti-Trust Law, as it is construed by the Supreme Court,— the argument being that it interferes with freedom of contract and infringes the Fifth Amendment to the Federal constitution. This new judicial doctrine of freedom of contract is coming to the fore in unexpected places, but always where it will aid aggregate and incorporated money and power.

In going over the discussions of this decision in the lay and legal journals, we regret to find much confusion of thought. A common fallacy is to discuss the *policy* and *tendency* of legislation which puts a ban



upon all combinations in restraint of trade and makes them alike criminal; whereas the policy and tendency of such legislation are questions within the exclusive domain of the legislature, with which the judicial courts have nothing whatsoever to do, until the point is reached where the legislature transcends, not doubtfully, but indubitably, some provision of the constitution. Constitutional law has so far run mad in the United States that it is a common thing to find in judicial decisions declaring statutes unconstitutional, long harangues against the policy or propriety of the legislation which the judicial courts assume the power to set aside. Before a judge can refuse to enforce an act of the legislature on the ground that it contravenes the constitution, he ought to be able to put his finger upon some provision of the constitution to which the act of the legislature is plainly and distinctly opposed. It is not for him to put forward his views as to the policy of such legislation. He is not elected or appointed to perform any such office. Such views are uncalled for, and ought to be regarded as indecent and offensive. It is precisely as though the legislature, in the preamble to a statute, should arraign a particular judicial decision. The legislature often repeals the rules of law laid down in particular decisions, but, so far as we have observed, no legislature has ever done so by referring specifically to any legal judgment. The legislature repeals the law made by the judges except where the law consists of interpretations of the constitution; because, as the law-making power, the legislature is above the judges. In theory the judges are not law-makers, though in point of fact they make much more law than the legislatures make, and much of it equally as bad. This new habit which the judges are taking on, of discussing the policy of acts of legislation which are challenged before them, is simply an assumption of superiority over the legislature in matters which are purely legislative; whereas their true position is exactly the reverse. In ordinary legislative matters they are inferior to the legislature. In other words, outside of the province of declaring the state of the supposed pre-existing common law, they have no legislative power at all, their mere function being to administer the laws.

The so-called "general law" is almost always held by the judges to be reasonable, because the judge themselves made it. To construe every statute which alters or repeals a rule of this reasonable judge-made law, so as to make it reasonable, would be to write it out of existence, and leave the law in that reasonable condition in which it stood before the legislature enacted the statute. That is precisely what the dissenting judges would have had the court do.

**CONSTITUTIONAL LAW: RIGHT OF TRIAL BY JURY — STATUTE PROVIDING FOR MAJORITY VERDICTS UNCONSTITUTIONAL.** — In the case of *American Publishing Co. v. Fisher*,<sup>1</sup> the Supreme Court of the United States hold that a statute of a Territory providing that civil causes may be decided by a verdict of nine or more members of a jury, is unconstitutional, as being in conflict with the seventh amendment to the Federal constitution. The reasoning of the court is that the seventh amendment prevents any legislation which has the effect of impairing any of the essential features of trial by jury at common law, and that unanimity was one of the peculiar and essential features of trial by jury at the common law. Mr. Justice Brewer, in writing the opinion of the court, says: —

No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right.

It may be that no authorities are needed to sustain this proposition; and doubtless it is equally true that authorities could be found sustaining it under similar provisions in State constitutions. But nevertheless it seems untenable. The constitution has in many other respects received a progressive, elastic and sensible interpretation. It must certainly strike one as anomalous that the court which could declare a corporation aggregate to be a citizen, within the meaning of another provision of that instrument, should find in this amendment an inhibition against changing the principle of jury trial, which required an unanimous verdict. Surely a court that was so progressive as to be able to declare that the interior lakes of North America were "high seas" within the meaning of an old Federal statute, though they are not connected with the *altum mare* by any navigable water that is not of artificial creation, might have taken a better view of this question of trial by jury. The greatest evil of trial by jury, an evil which surpasses all others combined, is found in the requirement of an unanimous verdict. This requirement puts it in the power of a single bribed jurymen to block the wheels of justice. It should also seem that a court which is so progressive as to declare that a State statute prohibiting a citizen of the State from entering into a contract of insurance with a foreign corporation is unconstitutional on the ground that it operates to deprive him of his liberty without due process of law, in violation of the Fourteenth Amendment,<sup>2</sup> ought not so to stick in the bark of the constitution when

<sup>1</sup> 17 Sup. Ct. Rep. 618.

<sup>2</sup> *Allgeyer v. Louisiana*, 17 Sup. Ct. Rep. 427.

dealing with the question of its guaranty of the right of trial by jury,—especially in view of the fact that the celebrated provision against the deprivation of liberty except by the law of the land has come down to us from Magna Charta through other American constitutions, and that the word “liberty” as used in that instrument was always limited so as to mean freedom from bodily restraint, and did not refer to the liberty of making contracts. Such a decision is a great mistake. It closes the door against any hope of securing a sensible amendment of the jury system applicable to Federal procedure, such as is now being introduced in many of the States. The constitution of the United States cannot be amended except by the consent of three-fourths of the States, and that makes any further amendment of it practically out of the question, except as the result of a convulsion or a revolution.

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NEUTRALITY LAWS: STATUTORY CONSTRUCTION — “COLONY, DISTRICT OR PEOPLE” INCLUDE INSURGENTS NOT RECOGNIZED AS BELLIGERENTS.—The question decided by the Supreme Court of the United States in *United States v. The Three Friends*,<sup>1</sup> appears to have been that a body of insurgents not recognized as belligerents may be regarded as “a colony, district or people” within the meaning of a penal statute. According to the syllabus in the advance sheets published by the Lawyers Co-operative Publishing Company, the court hold that “Any insurgent or insurrectionary body of people acting together, undertaking and conducting hostilities, although its belligerency has not been recognized, is included in the terms ‘colony, district, or people’ as used in U. S. Rev. Stat.<sup>2</sup> making it an offense to fit out a vessel to be employed ‘in the service of any foreign prince or State, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or State, or of any colony, district, or people with whom the United States are at peace.’ Proclamations and messages by the President are sufficient to give the court judicial information of the existence of an actual conflict of arms in Cuba in resistance of the authority of the government of Spain, although acknowledgment of the insurgents as belligerents by the political party has not taken place.”

The opinion of the court, which was learned and seemingly exhaustive, was written by Mr. Chief Justice Fuller, and probably reaches the real meaning of the statute. There is a vigorous dissenting

<sup>1</sup> 17 Sup. Ct. Rep. 495; reversing *s. c.* 78 Fed. Rep. 175.

<sup>2</sup> Sec. 5288.

opinion by Mr. Justice Harlan, who regards the conclusion of the court as "a very strained construction." Considering that it is a penal statute, it may be that the conclusion of Mr. Justice Harlan and of Mr. District Judge Locke in the court below is more in accordance with the doctrine, now as much honored in the breach as in the observance, that penal statutes are to be construed strictly. But statutes, and especially those which employ general terms, ought to be construed so as to reach their real meaning; and any case falling, by reasonable intendment, within any one of the general terms employed ought to be held to be included in, and not excluded from the statute.<sup>1</sup> But it seems not to be a strained construction at all to hold that fitting out and arming a vessel to be employed by the Cuban insurgents, is the fitting out and arming of a vessel to be employed by a "colony;" for the insurgents, though unrecognized and technically not a colony, constitute a larger portion of the colony or dependency of Cuba. It seems also that such an act is to fit out and arm a vessel for the service of a "district;" for the Cubans hold the exclusive, though somewhat shifting, possession of the entire eastern part of the island, which may be regarded as a district. And if these terms were not sufficient, beyond all doubt such insurgents are a "people." It is plain that the legislative mind could not foresee every possible phase of the question, but intended to use the most general terms and a sufficient number of them to reach just such a case as the one in question. But if this could be at all doubtful on what has preceded, it must be clear of all doubt, in view of the further expression, "to cruise or commit hostilities against the subjects, citizens or prop-

<sup>1</sup> The statute in question reads as follows: "Sec. 5283. Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel with intent that such vessel shall be employed in the service of any foreign prince or State, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or State, or of any colony, district or people with whom the United States are at peace, or who

issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than \$10,000, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited: one-half to the use of the informer and the other half to the use of the United States."

erty of any foreign prince or State." Certainly the fitting out of a vessel to cruise or commit hostilities against the subjects of a foreign prince or State is the very act for which the Three Friends was libelled, for she was fitted out to cruise and commit hostilities against the King of Spain, who is a foreign prince, and against the kingdom of Spain, which is a foreign State. It seems, therefore, that the vigorous dissenting opinion of Mr. Justice Harlan, who embodies therein the very learned opinion of Mr. District Judge Locke, does not present a satisfactory view of the question. On a question of difficult statutory construction, our zeal for a people struggling for their liberties against a most cruel and outrageous tyranny, ought not to blind our judgments as lawyers and judges.

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VALIDITY OF CONTRACTS MAKING THE ACCEPTANCE OF BENEFITS FROM A RAILWAY RELIEF FUND A WAIVER OF CLAIMS FOR PERSONAL INJURIES.—The odious decision of Mr. Federal District Judge Ricks, referred to in our last number,<sup>1</sup> holding the statute of Ohio annulling contracts imposed by railroad companies upon their employés, by which the latter agree to accept the provisions of a railway relief fund in lieu of claims for personal injuries received through the negligence of the railway company, has attracted no little attention, and our comments on that decision have brought to light two other cases where a more enlightened view was taken, even by a Federal judge. The first is the case of *Miller v. Chicago &c. R. Co.*,<sup>2</sup> decided by Mr. Federal District Judge Hallett in the United States Circuit Court for the District of Colorado, in December, 1894. In that case it appeared that the defendant railway company had organized a relief department among his employés for the purpose of giving pecuniary aid to those who might be injured or sick. The funds of the department were provided by contributions from the members, the company agreeing to make up any deficiency which might occur in any year. The rates of contribution by the members were such that a deficiency would seldom occur, and indeed was a very rare occurrence. In the application for membership in the relief department, and in the contracts of insurance, a clause was inserted, providing that, in consideration of the payments by the company, the acceptance of benefits by a member should operate as a release of all claims for damages against the company. The plaintiff, who was a member of the relief department, received injuries in consequence of the negligence of the defendant railway company, and

<sup>1</sup> 31 Am. Law Rev. 294.

<sup>2</sup> 65 Fed. Rep. 305.

thereafter accepted benefits as a member of the relief department. It was nevertheless held that his right of action against the company was not barred by the acceptance of such benefits. The learned judge reasoned that the employer ought not to be blamed for putting the burden of caring for the sick and injured upon the shoulders of the employes, where in general it properly belonged. But he further said:—

In doing this, however, he should not seek to evade the responsibility imposed upon him by law for the consequences of his own negligence. The rule which requires an employer to respond in damages to his servants for his negligent acts is sound and wholesome. It ought not to be set aside on any pretense of waiver on the part of the party injured, from doing something which he has a clear right to do. It is said that the employe is not bound to accept benefits from the relief fund, and, if he does accept them, with full knowledge that he waives his right of action, he ought to be bound by his act. The logic of the proposition should be differently stated. Having paid for benefits, upon what principle can he be required to renounce them? If, for illustration, the plaintiff had taken a policy in some accident and casualty company, could he be required to give up his right of action against the railroad company on accepting benefits from the insurance company? I think not. And the fact that the railroad company has entered into the insurance business does not affect the question in any way whatever. In respect to this contract, the defendant is an insurance company, and, having received the premium demanded of plaintiff, the latter is fully entitled to the benefits which he received, independently of any question affecting his relations to the railway company as an employe. Having paid for them, the plaintiff is as much entitled to the benefits received by him under the contract of insurance, as to his monthly wages for services rendered to the railway company. It was long ago wisely held that an employer cannot relieve himself from responsibility for his negligent acts by any provision in the contract of employment, and so it has come to pass that the company could not make the receipt of wages a waiver of this right of action. No more can it be said that payment and receipt of benefits under a contract of insurance, such as is alleged in the answer, should bar the plaintiff's action.<sup>1</sup>

It is gratifying to know that this case was lately affirmed in the Federal Court of Appeals for the Eighth Circuit. It is proper to state, however, that the affirming decision did not go to the full length of the decision rendered by Judge Hallett. It held that the contract, whereby the plaintiff relinquished his right of action for damages, should not

<sup>1</sup> The learned judge, referring to certain cases that had been cited to him, said: "I am amazed to find that, in several courts of unquestioned dignity and authority, the defense here made has been fully sustained: *Clements v. Railroad Co.* (1894), App. Cas.

482; *Johnson v. Railroad Co.* (Pa.), 29 Atl. Rep. 854; *Leas v. Renn.* (Ind. App.), 87 N. E. Rep. 428. I can only say that I agree with none of them. The reason of the thing stands altogether on the other side."

be regarded as constituting a good defense, when the plea of the defendant, which showed that if the relief association was at any time short of funds to meet its obligations to the member, such member could maintain an action against the company, failed to set out the arrangement between the company and the employes with such fullness and certainty that the court could see that the arrangement was fair and reasonable and not against public policy, nor voidable for want of valuable consideration. This decision was rendered by Mr. Circuit Judge Thayer and concurred in by Mr. Circuit Judge Sanborn. Mr. Circuit Judge Caldwell, a judge of great experience and whose utterances are always on the side of popular right, delivered the following separate opinion: —

Assuming that contracts of this character are valid, this case is rightly decided on the grounds stated in the opinion. But such contracts, in so far as they attempt to release a railroad company from liability for injuries inflicted on its employes through its negligence, are without sufficient consideration, against public policy and void, and must ultimately be so declared.<sup>1</sup>

Nothing more clearly illustrates the tendency of the Federal judicial mind to prop up money and power than the way those judges have dealt with this question. In *Vickers v. Chicago &c. R. Co.*,<sup>2</sup> Mr. Federal District Judge Allen, sitting in the Circuit Court of the United States for the Northern District of Illinois, held that such a contract on the part of a railway employé is valid, and, moreover, that it cannot be avoided on the ground that the employé signed it without reading it or understanding its purport, or on the ground that in signing it he was at a disadvantage in dealing with the railway company. We have, then, in the trend of recent Federal decisions, including the remarkable deliverance of Judge Ricks, referred to in our last issue,<sup>3</sup> a tendency to get the law into this condition: "Where a man ships goods over a railroad and accepts from the railway company a bill of lading in which the company endeavors to exonerate itself from the consequences of its own negligence, the clause by which the company endeavors to exonerate itself is void; but where a railroad company assumes the bailment of human lives and is negligent in taking proper care of them — and no matter how gross its negligence may be — it may contract that if it provides a hospital, kept up chiefly by the funds of the very men whose lives are in its charge, it may kill and maim them with impunity." Such decisions, if collected, would furnish an infamous chapter in the progress of our jurisprudence.

<sup>1</sup> 76 Fed. Rep. 448.

<sup>3</sup> 31 Am. Law. Rev. 294.

<sup>2</sup> 71 Fed. Rep. 139.

**INJUNCTIONS: LOWEST BIDDER NOT ENTITLED TO INJUNCTION TO RESTRAIN PERFORMANCE OF MUNICIPAL WORK LET TO HIGHEST BIDDER.**— In the case of *Colorado Paving Co. v. Murphy*,<sup>1</sup> the sole question before the United States Circuit Court of Appeals for the Eighth Circuit was whether one who has made the lowest bid for municipal work has such an interest in the matter that he can maintain an action in equity for an injunction to restrict the municipal authority from entering into a contract with a higher bidder for the doing of the work. The court holds that, while tax payers, in conformity with the settled law, have such an interest in the matter as might enable them to maintain a suit for an injunction, yet a bidder whose bid has been rejected has no such interest, although the governing statute might require the contract to be let to the lowest responsible bidder, and although he may be such bidder. The reason is that the statute was not enacted for his benefit, or for the benefit of any class of persons to which he may be supposed to belong.

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**INJUNCTION: TO RESTRAIN QUITTING EMPLOYMENT.**— In the case of *Mutual Reserve Fund Life Association v. New York Life Insurance Company and Harvey*,<sup>2</sup> the English Court of Appeal hold that in a contract of personal service a stipulation by the employed to "act exclusively for" his employers does not, in the absence of a negative covenant, express or implied, which is sufficiently clear and definite, confer upon the employers a right to obtain an injunction against the employed to restrain him from entering into the employment of other persons.<sup>3</sup>

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**NATURALIZATION: ACTION TO SET ASIDE NOT SUSTAINABLE BY AN INDIVIDUAL.**— In the case of *McCarran v. Cooper*,<sup>4</sup> the Supreme Court of New York, Appellate Division, First Department, lately decided that an individual cannot sue to set aside the naturalization papers granted to an alien, on the ground that they were procured by fraud, since the wrong, if any, was to the State, and not to the individual citizen. The court cite two early decisions in affirmation of this conclusion,<sup>5</sup> but the

<sup>1</sup> 78 Fed. Rep. 28.

<sup>2</sup> 75 L. T. Rep. 528.

<sup>3</sup> The Whitwood Chemical Company v. Hardman (64 L. T. Rep. 716; (1891) 2 Ch. 416) considered and applied; Lumley v. Wagner (19 L. T. Rep. O.

S. 264; 1 De G. M. & G. 604) distinguished.

<sup>4</sup> 44 N. Y. Supp. 695.

<sup>5</sup> Com. v. Paper, 1 Brewst. (Pa.), 269; Re Shaw, 2 Pa. Dist. Rep. 250.



propriety of the decision is quite obvious on principle. It is clear that some competent public authority must bring the action. In the second Pennsylvania case just cited, it was said that such authority must be the attorney-general of the United States, by himself or his subordinates, or the attorney-general of the State, by the district attorney of the county in which the naturalization took place.

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**EVIDENCE: PHYSICAL EXAMINATION OF THE PLAINTIFF — ANALYSIS OF URINE.**— In *Cleveland &c. R. Co. v. Huddlestone*,<sup>1</sup> the Supreme Court of Indiana hold that a plaintiff in an action for personal injuries alleged to have produced a secretion of albumen and sugar in his urine, may be required to produce in court specimens of his urine for analysis, accompanied by an affidavit that it was voided by him,—the privacy of his person not being thereby invaded, the urine being an inanimate substance and no part of his person. The decision proceeds upon sound views, as an elaboration of the opinion would show. The court take the view that it is against conscience for an actor in a court of justice to refuse evidence which speaks plainly upon the merits of his action. The doctrine that a person seeking relief at the hands of a court of justice ought to come with clean hands and make frank disclosures should be held applicable in courts of law as well as in courts of equity. No action should be tolerated when maintained by a suitor who insists upon concealing the truth.

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**INJUNCTION: RESTRAINING BOYCOTTING AND PICKETING.**— We are glad to note a wholesome decision rendered by the Supreme Judicial Court of Massachusetts in the case of *Vegelahn v. Gurtner*,<sup>2</sup> and one which, though the subject of some adverse criticism, presents an agreeable contrast to the cowardly manner in which the courts of some other American jurisdictions have treated the same question. We are sorry that so able a judge as Mr. Justice Holmes dissented. What the court held was that the maintenance of a patrol of two men in front of plaintiff's premises, in furtherance of a conspiracy to prevent, whether by threats and intimidations or by persuasion and social pressure, any workman from entering into, or continuing in his employment, would be enjoined. The decision of the New York Court of Appeals in *Curran v. Galen*, was decided upon substantially the same

<sup>1</sup> 46 N. E. Rep. 678.

<sup>2</sup> 43 N. E. Rep. 1077.

principle, though it was an action at law, and is equally to be commended. In that case it appeared that plaintiff, who had been discharged from employment by a brewing company, brought an action for damages against the defendants for conspiring and confederating together to procure his discharge and prevent him from obtaining employment. The defendants in their answer alleged as a defense that they were members of a Workingman's Assembly, Knights of Labor, which had an agreement with a Brewing Association, composed of the brewing companies, that all their employes should be members of the assembly, and that no employe should work for a longer period than four weeks without becoming a member; that what the defendants did in obtaining the plaintiff's discharge was as members of the assembly and in pursuance of this agreement, upon his refusing to become a member. Plaintiff demurred to this defense, and it was held that the same was insufficient in law, and that the demurrer should be sustained.

In the opinion of the court in this case, it was said:—

"Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the State. The sympathies, or the fellow feeling which, as a social principle, underlies the association of workmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed towards the repression of individual freedom, upon what principle shall it be justified?"

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**CARRIERS OF PASSENGERS: IS AN UNBOXED AND UNCRATED BICYCLE BAGGAGE?**—This question has been decided for the first time by the St. Louis Court of Appeals in the negative, in a very satisfactory opinion written by Judge Bond.<sup>1</sup> Omitting the statement of facts, which

<sup>1</sup> State ex rel. etc. v. Missouri Pacific R. Co., decided May 18th, 1897, not yet reported.

seems unnecessary to indicate the views on which the court proceed, the opinion of the court is as follows:—

The right to the carriage of his ordinary or personal baggage as a part of the consideration paid by a traveler for his own transportation, sprang originally from such concessions made by the carrier for the purpose of attracting travel over his line. Once established, the custom soon became universal and ripened into a right enforceable under the common law. In this and many other States it has received legitimate sanction and definition. Under our statutes the charges of the carrier for transportation are fixed by law and are required to include the carriage of 100 pounds of "ordinary baggage" and its proper checking.<sup>1</sup> To solve the question presented by this appeal, it is therefore necessary to determine what is meant by the term "ordinary baggage," and whether the bicycle tendered the defendant belonged to this class. Ordinary baggage is made up of two elements. First, certain things which may become such. Second, the bags, trunks, valises, satchels, packages or other receptacles in which things are to be put before they can be deemed baggage. In other words, the bag or other receptacle and their contents are both necessary components of the legal idea conveyed by the term baggage.<sup>2</sup> As to the things which may become baggage when properly contained, or as to what may be called the subjects of baggage, the definitions given in the decisions and by the text-writers, though necessarily wanting in explicitness from the difficulty of enumerating all the articles which may become baggage, are yet full, comprehensive and in perfect accord in their statements of the rules of law. Probably the best definition is that of Chief Justice Cockburn in *Macrow v. Great Western Railway*.<sup>3</sup> It is said in that case: "We hold the true rule to be, that whatever the passenger takes with him for his personal use or convenience, according to the habits of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey, must be considered as personal luggage."<sup>4</sup> All other things can only be taken as baggage when accepted as such by the carrier.<sup>5</sup> Under these rules of law can it be said that plaintiff's bicycle should have been accepted by the defendant as ordinary baggage in the state and condition in which it was tendered? Bicycles were invented as early as 1819.<sup>6</sup> The form in which they were first made resembles their general appearance to-day, the material difference being in the manner of propulsion. At first they were driven by striking the feet of the rider against the ground. Now they are propelled by the action of the feet of the rider upon pedals attached to a crank, over which a chain runs connecting the rear wheel. In 1869 the present principle of locomotion was adopted. At that time the relative size of the two

<sup>1</sup> Rev. Stat. 1869, sections 2678-2606.

<sup>2</sup> See Century Dictionary definition of baggage.

<sup>3</sup> 6 Q. B. (L. R.), loc. cit. 622.

<sup>4</sup> Affirmed in *Railroad v. Fraloff*, 110 U. S. 24.

<sup>5</sup> Elliott on Railroads, 4 Vol., Sec.

1646-1649; Hutchinson on Carriers, Sec. 685; *Hudston v. Ry. Co.*, 4 Q. B. L. R. 366; *Whitmore v. Steamboat Caroline*, 20 Mo. l. c. 518; *Spooner v. Railway*, 28 Mo. App. 408.

<sup>6</sup> Encyclopedia Britannica, 3 Vol., p. 575; Century Dictionary, definition and cut of velocipede.

wheels was changed, so that one was many times larger than the other. Now, however, the change in the size of the wheels has been abandoned and the original equality in that respect restored. When first used they were termed velocipedes. Shortly afterwards the term bicycle was universally adopted. Both terms are treated as convertible by the lexicographers and are defined as "a light vehicle or carriage."<sup>1</sup> So in cases involving the use of streets, the payment of tolls, and liability for negligence, bicycles are uniformly held to be vehicles or carriages.<sup>2</sup> This consensus of authority establishes that the locomotive machine known as a bicycle belongs to the genus vehicle or carriage. Taking plaintiff's as a type of the bicycle of to-day (and leaving out of view for the moment the fact that it was unpacked and unprotected when tendered to defendant), was it a thing comprehended within the definition of personal or ordinary baggage? Of course, it has no utility during the trip. It is claimed, however, that it was convenient and useful at the end of the journey as a method of further locomotion. Conceding this to be true, cannot the same be said, and with equal truth, of every other form of a vehicle or carriage which the traveler might be able to own. Some of these, as the two wheel skeleton cart used in training horses,—fall within the statutory limit of one hundred pounds as to weight, and so indeed might the light single seated buggy often observed on the streets. All of these vehicles would doubtless contribute as much to the convenience and pleasure of the particular class using them at the end of a journey as bicycles would to their owners. But we have not been cited to any authority from any source holding that a carrier must receive as ordinary baggage a vehicle or carriage, however variant its form. It is clear, therefore, that other things than mere utility or convenience at the end of the journey must concur before we are justified in holding a thing, having such use only, an article of personal baggage. But it may be argued that the lesser size of the bicycle than other forms of the genus vehicle to which it belongs suffices to distinguish it from the general class and bring it within the meaning of ordinary baggage. The fault of this reasoning is that it overlooks the fact that bicycles, though lighter and smaller than other vehicles, are so delicately constructed, in the effort to secure the greatest strength compatible to the lightest weight, that their handling necessarily requires the greatest care and skill, as well as ample space to prevent injury by external contact. In view of these considerations the argument based on a difference in size between bicycles and other vehicles loses its force. Our opinion is, that from their nature, structure, and classification, bicycles belong to those things which are properly the subjects of freight contracts, and are not embraced in the class of things denoted by the words personal or ordinary baggage. They have been in much use both here and in England for some years. We have been wholly unable to find any precedent for a different conclusion. As a matter of general learning we do know that bills have been introduced in the legislative bodies

<sup>1</sup> Century Dictionary, Worcester's Dictionary (Supplement), Webster's International Dictionary, definitions of velocipede and bicycle.

<sup>2</sup> Mercer v. Corbin, 8 (Ind.) L. R. A. 221; Thompson v. Dodge (Minn.),

28 L. R. A., p. 608; Geiger v. Turnpike Road, 28 L. R. A. (Pa.) 458; Com. v. Forrest, 29 L. R. A. (Pa.) 365; Twilley v. Perkins (Md.), 19 L. R. A., p. 682, and notes.

of the different States to make it the duty of carriers to transport them as ordinary or personal baggage. This demonstrates that, in the judgment of the profession at large, they have no right to be so considered, in the absence of an express statute. While the terms in question are flexible and may include the new uses, falling with the legitimate scope of their meaning, which arise in the growth of society, we are not warranted in giving them a new meaning so as to cover different subjects not within the principle upon which they are founded. To do this would be judicial legislation.

Another view of this case presents an insurmountable obstacle to the relief asked. The bicycle was neither boxed, packed or guarded in any way when plaintiff demanded its reception as baggage. The law does not recognize as baggage the things contained, as discripted from the bag, box, trunk, boxing case or receptacle which contains them; nor is any duty cast upon the carrier to receive personal baggage until it has been placed in a condition of reasonable security for handling and transportation. Under the facts shown in this record the defendant had the absolute right to refuse to accept the bicycle tendered as personal baggage (irrespective of any question as to its right to be so classed), on the ground that it was not deliverable to him as such until it had been properly packed, crated or otherwise protected, from the perils of handling and transportation. The result is that the judgment of the trial court in awarding a peremptory writ of mandamus was erroneous. It will therefore be reversed. All concur.

## CORRESPONDENCE.

## RESTRICTIVE INDORSEMENTS: A CRITICISM OF MR. WORTH.

PHILADELPHIA, April 17th, 1897.

*To the Editors of the American Law Review:*

I am extremely surprised that an article so ill-tempered in its language as the one on "Courts v. Clearing Houses" should have been allowed in a publication presumed to deal and speak judicially with matters pertaining to the law and decisions.

The law of indorsements as stated by Mr. Worth in "Courts v. Clearing Houses" is correct and was ably set forth in *Crane v. Bank*,<sup>1</sup> cited by the writer of that article, but I think that clearing house officials in formulating rules do not "seek out strange devices and fasten them upon the business world against the protests of the courts" but rather strive to attain a certain measure of certainty, for there is no more baneful enemy of business enterprise than *uncertainty*.

I think, however, they erred in spreading broadcast circulars, all arising from the action of the New York Clearing House. They only tended to aggravate the anxiety and create distrust among business men — the law had not been changed — only their interpretation of it had been corrected, and even now some of them are befogged on the subject.

The case that created all this commotion was *not* the Pennsylvania case of *Crane v. Bank* but that of the *National Park Bank v. The Seaboard Bank*.<sup>2</sup>

New Yorkers have so little regard of anything outside of their own world that a case in *Pennsylvania* would scarce cause a ripple — it was only when their own fold was invaded that the scare was created.

In the New York case a check for \$8 had been raised to \$1,800 and paid by the National Park Bank to the Seaboard National Bank to whom it had been sent by a bank at Eldred, Pa., indorsed "for collection for account of Eldred Bank." The plaintiff argued that a person who collects a draft, asserts its genuineness, and is bound to repay the amount in such cases as this, whether he indorses it or not.

Defendant claimed that the Eldred Bank was a mere agent — and that, having received the money and paid it to his principal, it was absolved from liability, and the court decided in favor of the defendant in a very short opinion. This case was followed by one in the U. S. District Court — *U. S. v. Amer. Ex. Natl. Bank*.

In none of these cases was the Pennsylvania case cited by court or counsel; although I will agree with Mr. Worth in saying that, for lucidity of expression,

<sup>1</sup> 178 Penn. St. 566.<sup>2</sup> 114 N. Y. 28.

all of the cases cited by him are better than the ones that started the New York Clearing House "on the run and all the others scampering after."

Their action, however, was not to create but allay distrust, as they had heretofore supposed that they had the same recourse to previous indorsers whether the indorsement was general or restricting.

The record in the Pennsylvania Case does "not show a breach of trust by the Clearing House officials or a fraudulent conversion of money belonging to the Washington firm," a deliberate conspiracy of which the Clearing House was the instigator and beneficiary, the Keystone Bank a mere scapegoat and the Washington firm predestined victim.

This language is very "Bryanesque" and is not borne out by the records or facts, and certainly displays a woful ignorance of the methods by which banks make their clearings either in New York, Philadelphia or St. Louis. The checks are placed in sealed envelopes with the amounts stated on the outside. The *Clearing House officials have no knowledge of the contents of the envelopes and certainly are in ignorance of the character of the indorsements that the checks bear.* That being the case, how could the Washington firm have been the "predestined victim."

All errors, etc., are corrected between the banks party thereto. The Clearing House is never called in except to arbitrate disputes.

The idea of the Keystone Bank being a "scapegoat" is laughable to all Philadelphians. It victimized every one it could get within its clutches — including the city of Philadelphia, whose treasurer was sent to the Penitentiary for his ill-doings. The president of the bank is a fugitive from justice with a reward hanging over him. The officers of its ally, "The Spring Garden Bank," were also sent to prison, and they and the city treasurer were recently pardoned. In a recent suit entered, the city of Philadelphia stated that after business on the 19th of March, 1891, the city treasurer delivered, in pursuance of a practice for the safety of the city's funds, over \$58,000. On this same night the officers of the bank abstracted over \$19,000 of checks, and put them through the Clearing House the next day without giving the city credit for them. This is one of the many little practices of the scapegoat cited by Mr. Worth.

Working himself into a righteous indignation he speaks about a "skin game" perpetrated by the Clearing House upon Crane, Parris & Co., but the "skinning" was all done by the Keystone Bank, who were allowed to continue by the Treasury Department when its affairs were known by the examiner to have been insolvent long before the day it was closed.

The checks retained by the Clearing House until *its indebtedness for that morning's exchange* (not its general indebtedness) was paid, was in pursuance of an agreement made with the bank. The worst that can be said is that it was a mistake of judgment — as they had no knowledge of any indorsements and could have conspired with no one to defraud the owners of the checks.

I am not writing in a spirit of controversy, but to correct an injustice done to the Clearing Houses, and to show that with all the elaborate analysis of Crane v. Bank, it had no effect on the "fog horn" as he called it, but that the commotion was caused by cases that he does not even cite.

Yours truly,

CHARLES F. WIGNALL.

408 CHESTNUT ST., PHILADELPHIA.

## A REPLY TO THE ABOVE.

*To the Editors of the American Law Review:*

In reply to Mr. Wignall's criticisms, I have but little to add to what has already been said, and nothing whatever to take back. The case of the Seaboard bank,<sup>1</sup> was decided March 19, 1869; early in October of that year, the volume in which it is officially reported was placed in the St. Louis Law Library; and before the close of that year the decision was to be found in every well equipped library west of the Allegheny mountains. The *Mercantile Adjuster* circulates widely among bankers throughout the United States and Canada; and, in its issue of August, 1896, I undertook to write up the Seaboard case; to show that it rests on the authority of *La Farge v. Kneeland*,<sup>2</sup> decided in August, 1827; and that the latter rests on the authority of *Cox v. Prentice*,<sup>3</sup> decided in January, 1815; all three cases being grounded on the obvious principle that "an agent who receives money for his principal is liable, *as principal*, so long as he stands in his original situation, and until there has been a change of circumstances, by his having paid over the money to his principal, or done something equivalent thereto." But in preparing the article which Mr. Wignall criticises, with so much zeal and so little knowledge, this New York case was studiously ignored. Because it occurred to me that, to parade that case before Judge Thompson, would be in no better taste than reading *Waverley* to Walter Scott, or quoting Jarndyce and Jarndyce to Charles Dickens; and would insult the intelligence of the broad-gauge lawyers who patronize the Review. For with readers of that character, this New York case was as obsolete, as much a thing of the past, as any moss-covered tradition of the Six Nations could possibly be. Mr. Wignall, however, now asks us to believe that, in the midsummer of 1896, the New York Clearing House first became aware of the existence of that decision. And the immediate result was most disastrous to the business interests of the country. To borrow Mr. Wignall's exact language, it "started the New York Clearing House on the run, and all the others scampering after." He further tells us that "this case was followed by one in the U. S. District Court, *United States v. American National Bank*;" by which it is fair to presume, he means *U. S. Bank*,<sup>4</sup> decided in September, 1895.

But when he gravely assures us that neither the case decided at Albany in March, 1889, nor that decided at Brooklyn in September, 1895, "cite the Penn'a case," decided in February, 1896, he fairly breaks his own record, as it were. Indeed, the editor of the *Bankers' Magazine*, disguised and masquerading as a Philadelphia lawyer, could not well blunder more stupidly. Mr. Wignall not only insinuates that I have violated Pennsylvania's statute against cruelty to animals, but he does more — he charges me with being ignorant of Clearing House methods. As to that count of his indictment, I claim no other knowledge than is to be gained by a careful reading of the opinions of such lawgivers as Judge Williams.

Mr. Wignall, on the other hand, betrays a degree of familiarity that is decidedly suspicious; indeed, if he had actually guided the knife with which

<sup>1</sup> 114 N. Y. 28.

<sup>2</sup> 7 Cow. 460.

<sup>3</sup> 3 M. & S. 844.

<sup>4</sup> 70 Fed. Rep. 232.



Crane and Parris were so artistically flayed by the Philadelphia high-binders, my critic could scarcely have portrayed the *modus operandi* with greater particularity. Again, he says my language is "very Bryanesque."

Now, without knowing just what that charge involves, and not wishing to run any chances, I merely "deny the allegation and scorn the allegater." What I am especially desirous to avoid, so far as possible, is the style of which my critic shows himself so complete a master.

GEO. C. WORTH.

ST. LOUIS, May, 1896.

## BOOK REVIEWS.

**STREITFRAGEN AUS DEM INTERNATIONALEN CIVILPROCESSRECHT.**— Unter besonderer Berücksichtigung der Neuen Oesterreichischen Civilprocessgesetze. Von DR. GUSTAV WALKER. Wien, 1897. Manz'sche k. u. k. Hof-Verlags- und Universitäts-Buchhandlung. 1. Kohlmarkt, 20. 1 vol. pp. 232.

This volume, as its title indicates, treats of the conflict of laws in the field of international remedial law, or as is perhaps better understood in our law phraseology, of private international law. The book has particular reference to the recent Austrian legislation on this subject, adopted on the initiative of the Minister of Justice, Gleispach, to whom it is respectfully dedicated by the author, Dr. Walker, a distinguished jurist and advokat of Vienna.

The new "civilprocessrecht" marks an era in Austrian jurisprudence, and is hailed as the greatest achievement in the high plane of public law since the great Civil Code of the empire.

There are indeed many difficult questions which arise out of the conflict of our own laws between the States; but the difficulties are infinitely greater in continental Europe, where international relations are so close, and the several systems of laws and administration so foreign to each other. This new law and this treatise have alike for their commendable purpose, to quote its language, "to settle some of the conflicts of private international law, which by reason of the co-existence of numerous and often very different systems of law in the States of the earth, have arisen between them." So great have been the conflicts and the uncertainties in this important field of law, that law-writers, like the Skalden Jatgejr in Ibsen's "Kronprätendenten," have come to "doubt their own doubts." Whatever tends to settle some of these in an authoritative way, is an important gain to jurisprudence and to the administration of the law between nations.

The two conflicting principles which have contended in the administration of justice when the *lex fori* and the *lex loci* conflict have been those of reciprocity and of retaliation. And of the former, two modes are distinguished, — formal or absolute, and material or relative, reciprocity. The Austrian system is based upon the principle of "absolute reciprocity," which only comes into play "when, in a case of conflict of laws, the foreign State makes no distinction between its subjects and the subjects of Austria." If it makes a discrimination, a like discrimination is made by the Austrian courts against the foreigner whenever the conflict of laws gives an opportunity for the application of the *lex talionis*.

On the whole the work is a valuable contribution to a great subject; and marks a step in advance in the high project for unity of jurisprudence and comity of administration in private international law. It is rich in citations and authorities, and makes an exhaustive, comparative study of the different projects of codification of private international law by jurists of Europe and

America, among which the great work of the late David Dudley Field, "Outlines of an International Code," has a commanding place.

JOSEPH WHELESS.

ST. LOUIS.

**RULING CASES.**—*Ruling Cases*—Arranged, annotated and edited by ROBERT CAMPBELL, M. A., of Lincoln's Inn, Barrister-at-Law, Advocate of the Scotch Bar, and later Fellow of Trinity Hall, Cambridge. Assisted by other members of the Bar, with American Notes by IRVING BROWNE, formerly editor of the American Reports and the Albany Law Journal. Vol. X. *Easement—Estate*. London: Stevens and Sons, Limited. Boston, U. S. A.: The Boston Book Co., Law Publishers and Booksellers. 1894. pp. 801 and XXXII. Price, \$5.50 per vol.

This will doubtless be regarded as the most interesting volume of this series thus far published. It will certainly be so regarded by any one interested particularly in real property law, for the subjects in this volume are almost wholly real property subjects. The title *Easements* occupies more than three hundred pages. Twenty-one cases are printed in full, covering all branches of the subject. They are arranged under six sections treating of the Nature of Easements, their Acquisition, Particular Easements, Profits à Prendre, Extinction of Easements, Remedies for Disturbance of Easements. There are several very full notes by both the English and American editors. We have had occasion to examine some of these notes in detail and can testify to their correctness and value.

The number of cases cited is about twenty-two hundred, of which somewhat more than half are English.

It is announced that an index will be published soon together with consolidated Tables of English and American Cases, and Addenda up to date. This will not only serve as a guide to the contents of the volumes already published but will also indicate the principal and subordinate titles under which the remaining topics of this work will be treated.

**THE PRESUMPTION OF INNOCENCE IN CRIMINAL CASES.**—By JAMES BRADLEY THAYER, LL.D. Reprinted from Yale Law Journal for March, 1897.

This monograph of thirty large pages in long primer is the work of one who is recognized as a master in the law of evidence. It will repay perusal by the student or by anyone who has a professional interest in the subject discussed.

**WISLIZENUS' UNDERHILL ON TRUSTS AND TRUSTEES.**—The Law relating to Private Trusts and Trustees. By ARTHUR UNDERHILL M.A., LL.D., of Lincoln's Inn, and the Chancery Bar, Barrister-at-Law, Author of "A Treatise on the Settled Land Acts," etc., etc. Fourth Edition, Enlarged and Revised. First American Edition, by F. A. WISLIZENUS and ADOLPH WISLIZENUS, of the St. Louis Bar. St. Louis: the F. H. Thomas Law Book Co. 1896.

It may be safely said that no legal treatise reaches a fourth edition unless it possesses decided merits, perhaps it might be said, exceptional merits; and this is even more certainly the case in England than in this country, where activity on the part of the publisher in urging one of his publications on a far more numerous profession will often procure a certain measure of success for an imperfect work. The excellent work of Mr. Underhill which is now for the first time offered to the American bar with American notes, has heretofore

found its way to the shelves of the more discriminating members of the profession in spite of this serious defect. Now, that it has been adapted to the wants of the American practitioner by a thorough annotation from the American reports, vastly expanding the illustrations of the doctrines expounded in the text and developing those features in which our jurisprudence has diverged from that of the mother country, it may reasonably be expected that the work will enjoy a largely increased demand in this country. The plan of the work is that of a systematic statement in chapters, sections and paragraphs of the *principles* of the law of trusts and trustees, followed by numerous illustrations of the application of those principles to particular cases. There is little or no discussion of the rules of law thus stated, and what there is seems to be confined to the illustrations, which are printed in smaller type. The main text, therefore, may very properly be considered a codification of the English law in regard to trusts and trustees. In the selection of his illustrations Mr. Underhill has "chosen modern cases in preference to ancient ones; because, as has been truly said by Sir George Jessel, M. R., 'it must not be forgotten that the rules of Courts of Equity are not like the rules of common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved and refined from time to time. The doctrines are progressive, refined and improved; and if we want to know what the rules of Equity are, we must look rather to the more modern than the more ancient cases.'" So far as the hurried examination of the reviewer has extended, the principles of the law are stated with perspicuity as well as brevity, and the arrangement is excellent.

It is possible to say of this work, as of every English work, that it expounds a system of rules from which we have departed to a greater or less extent in this country, and that it is not, therefore, as useful to the American lawyer as a treatise written by an author of equal abilities whose purpose would be to set forth the American law of the subject. This is a just criticism of all English works, even of those which have been adapted to the American market by careful annotation; and it may be said that when an American treatise appears on any subject which equals the English treatise in every other way and has the additional merit of being primarily a presentation of the law as it exists in this country at the present time, the English treatise will fall to the rear. When, for example, an American work on Sales appears which can rival Mr. Benjamin's work on that subject, that work will cease to be the standard, as it now is, though its pre-eminent merit will long maintain a place for it on the library shelves of the American lawyer. From this process of ultimate decadence Underhill on Trusts will, we think, be preserved for a long time by the admirable annotation of its American editors. The brothers Wislizenus are well and favorably known to the bar of St. Louis for their scholarly acquirements as well as their ability as practitioners; and they have found time—or taken time—in the midst of exacting professional labors to collect in their notes the American decisions relating to the subject, and have been at particular pains to call attention to those points in which our law diverges from the English law as stated in the text; so that the American practitioner may feel no apprehension that he is leaning upon a broken reed in using this work. Their notes to chapter 41, relating to the investment of trust

funds, may be pointed to as especially deserving of praise. The book is well printed, though the type of the "illustrations" is a little trying to old eyes. It has a table of cases and a good index.

**SIMONTON ON THE FEDERAL COURTS.**—Federal Courts, their Organization, Jurisdiction, Procedure. Lectures before the Richmond Law School, Richmond College, Virginia. By CHARLES H. SIMONTON, United States Circuit Judge. Richmond: B. F. Johnson Publishing Co. 1896.

This is a monograph of 120 pages, well printed. Its title page indicates, in a general way, its character. Very little can be done in so small a compass to acquaint students with the nature of the Federal courts, their origin, jurisdiction and procedure, a subject abounding in complications and fertile in decisions. Nevertheless this will doubtless be found an excellent introduction to the subject.

**THE LAWYERS' REPORTS ANNOTATED.**—All Current Cases of General Value and Importance, with full Annotations. Volumes 1 to 34. ROBERT DESTY, Editor of Vols. 1 to 13; BURDETTE A. RICH and HENRY P. FARNHAM, Editors of Vols. 14 to 34 inclusive. Rochester, N. Y: Lawyers Co-operative Publishing Co.

We suppose that all well-informed readers of the *AMERICAN LAW REVIEW* are acquainted with the general character of this series of selected and annotated reports. The leading idea which the editors and publishers have been for several years developing, by a gradual and steady evolution, is to select from the latest reports, without waiting for their official publication, those cases which seem to be of the greatest general value and importance, and to present them with carefully prepared head-notes, without cutting out the briefs of counsel, and, in connection with them, to present important foot-notes, each of the latter being intended to exhaust the particular topic under discussion. This series differs from the series known as the *American State Reports* in these leading features: 1. In this series cases are presented without waiting for their official publication. 2. Briefs of counsel are included. 3. Selections are made from the decisions of the Federal as well as of the State courts. 4. In respect of typography, this series is printed in double column solid brevier, the notes in double column solid or slightly leaded nonpareil, making each volume a large imperial octavo volume. The *American State Reports*, on the other hand, do not select their cases until they appear in the official reports, eliminate the briefs of counsel, select only from the State reports, and are printed in larger type, long primer for the text and brevier for the notes, making a more agreeable page to read than the *L. R. A.* But what the page of the latter lacks in appearance it makes up in quantity of matter. In one volume under our hand at the moment we find 832 pages of decisions, besides tables of cases, etc., filling out 82 pages more; and these pages run from 1,100 to 1,200 words, according to the proportion of notes to the text. It is a little surprising to find that two series, each aiming to select the most important decisions, agree so little in their selections. Only 17 or 18 per cent of the decisions found in the *L. R. A.* are duplicated in the *Am. St. Rep.* With regard to annotations, the effort of the respective editors of these series seems now to be very much the same—to produce exhaustive notes on particular topics, and not to duplicate those notes. But behind the *American State*

Reports in point of time lie two other series connecting with them and owned by the same publishers,— the American Reports, and, still further back, chronologically the American Decisions. The cases selected in both of these earlier series are copiously annotated; though the annotations in the American Decisions are infinitely superior to those in the American Reports. Now, the notes to the American State Reports refer the reader back to cases and notes both in the American Reports and in the American Decisions; so that, roughly speaking, every case printed in the American State Reports is annotated, with a note of some kind, longer or shorter, the shortest being a collection of cross-references sending the searcher back to the two preceding series, where he may find further cases or notes on the same subject.

A comparison between these two series, which may be regarded as in some sense rivals, would possibly be ungracious on the part of one who finds so much aid in the possession and use of both of them. It is not our purpose to enter into such a comparison at length, so much as to notice the leading features of the series now under review, known as the L. R. A. No one who has used this series to any considerable extent, from the beginning to the present time, can fail to have become impressed with the conclusion that it has been steadily growing in excellence from first to last. It has been undergoing a persistent evolution and development from good to better until it has possibly become the best. The most conspicuous feature in this development is in the method of annotation. This has undergone a very considerable alteration since the issue of Vol. 1. We have been at the pains to have the notes in that volume and several subsequent ones counted and the length of each one noted, with the following result. In 832 pages of text, in Book 1, there are 145 notes, exclusive of those of a few lines only, and the aggregate length of these notes would equal 95 pages of the book, so that the average length of the notes is about two-thirds of a page. On passing to Book 8 we find that there are  $11\frac{1}{2}$  pages of notes in 100 pages of the text, showing about the same proportion of notes to text, but these notes are only 11 in number, showing that the average length has risen to a little more than a page. Book 15 shows about the same proportion of notes to text, and about the same average length of the notes. But Book 20 shows in 200 pages only twelve notes, covering 84 pages altogether. The length of the notes has risen to nearly three pages on the average, and the proportion of notes to text has largely increased,—141 pages to the book as compared with the 95 pages in the earlier book. The change is still more marked in Book 30, where, in 200 pages, only six notes are found, covering  $83\frac{1}{2}$  pages, an average of  $5\frac{1}{2}$  pages to the note, the proportion of notes to text remaining about 140 pages to the book. What is more important, the increase in length is not evenly distributed, but is produced by a few long notes which are intended to, and, as far as we have been able to judge, do exhaust the particular subject. Some of them cover from five to ten pages, and one that caught the writer's eye reaches the very respectable dimension of sixteen pages. In the fine type in which these notes are printed, which runs about 1,800 words to the page, a note of that length makes quite a treatise. If the proportion of notes to text is kept up in future books, and as it is the result of eight years' experience in finding out what the profession want, it is not apt to be diminished, — the publishers will be furnish-

ing with each volume of these reports annotations which, if printed in ordinary type in text-book form, would make a good-sized volume alone. We are sometimes tempted to wish that they might be so printed, even if it involved an additional outlay for each book, as it is not a little trying, especially to the eyes of an old lawyer, to read a ten-page note in the fine type in which these notes are printed.

The character of the notes in the later issues may be gathered from the following list of the notes found between pages 200 and 400 of Book 20: As to the power to appoint receivers of corporations where there is no other relief asked. p. 210, 2½ pages. Necessity of notice of default to bind guarantor. p. 257, 4½ pages. When insurance agent is the agent of the assured. p. 277, 7½ pages. Judicial power to review action of boards in respect to licenses of physicians, dentists, etc. p. 355, 1 page. Right to strict foreclosure of mortgage. p. 370, 5 pages. Exclusiveness of jurisdiction by appointment of receiver. p. 391, 2½ pages.

With regard to the *raison d'être* of the L. R. A. and also of the American State Reports, it may be said that it is practically impossible for any lawyer or firm of lawyers to own all of the Reports. The number in the whole country, who have what are popularly called complete law libraries are so few in comparison with the number who would like to own them, that the truth of this statement is not affected. It is a matter of necessity, therefore, that every lawyer should select some reports out of the mass for his library. The principle of selection necessarily comes into every lawyer's experience.

The thing which a lawyer buys in a set of State reports is a large number of cases. In buying a set, for instance, of Massachusetts Reports, he buys a lot of cases which have been put in these reports, not because the judges of the Supreme Judicial Court of Massachusetts considered the questions on the cases important, but because some lawyer in the State of Massachusetts chose to carry each of the questions in these cases one by one up to that court for its decision. Of these questions, by actual count, nearly fifty per cent are questions of practice peculiar to the courts of Massachusetts. Many cases turn on the construction of some statute which has nothing but a local application. Many cases are carried up which are distinctly governed by former adjudications of the Supreme Court of Massachusetts, which that court simply so declares. The amount of old straw that is thrashed over and over in the reports of any State is very large as compared with the amount of new or generally important matter.

There are several series of reports which contain only cases that are of general interest and value on particular branches of the law. Some of them are made for lawyers whose special practice is criminal law, and they contain only criminal cases; others are made specially for attorneys of railroad corporations, and they contain only cases relating to the law of railroads; another set contains only probate cases. In any of these sets there is vastly greater service to the purchaser in proportion to the money invested than in any investment in State reports. There are other series, made to serve lawyers in general practice, and therefore containing cases of general value on every question of the law; and of these is the series now under review.

The value of a series like this is greatly promoted by the principles which govern the selection of cases. If a series should contain only those cases which

settle well-known principles of law, of daily recurrence in a practitioner's office, it would not be much more serviceable than the same investment in any set of State reports. But, recognizing that a lawyer wants aid when he has a *difficult* case, the editors of this series have adopted as guiding principles in the selection of cases, the plan of printing all cases which involve a new point, and to print those cases on general subjects which illustrate further the difficult, doubtful and much adjudicated questions, where the conflict of authority is great and a correct decision involves a discriminating comparison of all of the authorities on the one side and the other. A set of reports on all topics of the law, made up of cases from courts of last resort, dealing with unusually difficult questions, is extremely likely to give help in time of need. Such a series is the series to be searched for cases on every doubtful and troublesome question arising in a lawyer's office. Selected reports, that is, reports made up of cases put there because of reasons above stated, give much more service to their owners in proportion to the cost than any series of reports containing the grist which is ground out because the public brings it to the mill to be ground. There is no purpose herein to discourage the purchase of sets of State reports or other publications containing the "grist" that comes from the courts. The suggestion is that it is wise to purchase *first* those reports which will be of the most service, and later those which will be of less service, but still of sufficient service to justify the investment.

No suggestion which we could throw out to our professional brethren with regard to the best mode of furnishing a working library for a law office would meet the conditions and demands of each practitioner, or of each office. But our suggestion toward a solution of the law book question for lawyers who can invest only a moderate amount of money, say one to five thousand dollars, in a law library, is that they should bear in mind two classes into which law books naturally divide themselves: namely, books for search and books for reference. The reference books are the great mass of reported cases found in the great law libraries and used when a reference is made to them from a text-book, or an annotation, or another case. Search books are books that are used to find these decisions: the text-books and the digests. Now, the main difficulty in making up a working library is to get the proper proportion between search books and reference books. It is easier to make mistakes in the latter than in the former; for the number of reports is legion, while the text-books are still, fortunately, limited in number. The trouble with the reference books is that the purchaser must buy such an amount of stuff that he is never likely to find in it even the small percentage of cases which he is likely to want. It is estimated that not over one case in ten that comes from our courts of last resort is likely to be useful in any other jurisdiction than the one in which it is rendered. The reason is plain. It has been found that nearly fifty per cent of the cases decided turn upon questions of procedure. Probably one-half of the remaining cases concern the construction of some statute peculiar to the jurisdiction in which a decision was rendered, and many other cases merely thresh over old straw. The result is as stated, that probably not over ten per cent of the decided cases are likely to be serviceable in any lawyer's office at any time. The question is to get this ten per cent of cases segregated from the mass. This has not been completely done, and will not be done; but a very good attempt has been made at it in the L. R. A. These reports contain about five per cent of the decisions rendered in the courts of last resort since 1888. In



the American Decisions and the American Reports are found about the same percentage of the decisions previous to that time. We have heretofore had occasion to speak in high praise of the excellent selections of cases made in these reports. While they do not contain all the valuable decisions we think they contain few that are not valuable. They contain cases on every branch of the law and so many cases that the lawyer searching carefully the digests of these reports is extremely likely to find in them a decision that helps him or is decisive of the question which he has in hand. Of course if the lawyer has not the money to buy all three of these sets of books required to give him a complete line of decisions, he had better drop the oldest; and if he is still lacking in the necessary funds, he had better get the latest first and fill up his shelves with the older selections when he can.

Every lawyer is supposed to have his own State reports. They are the first necessity in his office. They will generally cover the large majority of points which arise in the daily grind of practice. When one has to go outside of his own State reports, he has a question unusual in character or perhaps of first impression, or on which there is great conflict of authority. In the selection of cases for the L. R. A., the guiding principle appears to have taken uncommon cases, cases containing points of first impression, cases involving an unusual state of facts or cases containing points on which the courts are greatly in conflict. They have, of course, the advantage—the very great advantage—of being fresh, containing nothing earlier than 1887. The courts show an increasing tendency to prefer late cases to old ones, linotype law to black letter law, so to say. The L. R. A. have also this great advantage, that they in general report cases as soon as the decision is rendered. An important case is usually presented to the court by able counsel and on an exhaustive presentation of authorities; so that the briefs of counsel found in the L. R. A. are, as a rule, very helpful. Without making invidious comparisons, we think that the young practitioner will not make any mistake in making a set of the L. R. A. the next purchase after getting his State reports. If he follows this with the American State Reports, the American Reports and the American Decisions, he will need only a set of United States reports to make a fair collection of books of reference, a collection which will enable him to decide what the law is in probably ninety-nine cases out of a hundred that come to him. The American State Reports will, however, have a diminished market or asset value to him, from the fact that the publishers will not fill out or continue sets of these reports in the hands of second-hand dealers, which dealers would be practically the young lawyer's only market in case he should be forced to part with his library.

The L. R. A. are exceedingly useful aids in the search for cases not reported in this series. The annotations often furnish the same results that a lawyer would secure only after much time spent in the examination of reports in a large library; namely, a complete brief on the point in question. In them an effort has been made to set out every adjudication upon a point in the American and English reports. The labor involved in this is, of course, very great; greater, in fact, than a busy lawyer could afford to devote to a case in which very large interests were not involved; and it is the labor of an expert annotator, whose time and attention are not taken up with the details of a miscellaneous practice. Moreover, a subject that is once fully treated is not again treated, except as it is referred to in notes to subsequent cases. The result is that, both in cases and in notes, the L. R. A. pages are packed as solidly with useful

material as it is possible to pack them. One volume contains about twice as much as a volume of the rival series above referred to; and about five times as much as a volume of the Missouri reports. Consequently, in the amount of matter alone, irrespective of quality, the purchaser of the L. R. A. gets more value for a dollar than in any other reports. From every point of view, in quantity and in quality, the L. R. A. are perhaps the cheapest law books published, and the young lawyer cannot invest his money to better advantage, after laying in a set of his State reports, than by immediately adding a set of these reports.

In the matter of text-books, the profession generally have come to the point of purchasing books as they need them, that is, of purchasing the latest and best book on the subject involved in a case in their hands. Of course, there are leading branches of the law, such as Corporations, Contracts, Equity Jurisprudence, etc., on which every office should contain a competent treatise. When a sufficient collection of these indispensable text-books is obtained, the practitioner can not do better than to add to his library selected and annotated cases. They serve as a great body of case law in which to hunt for an authority, and they further furnish an index to some, or, as in the case of the L. R. A., to all cases on a point, whether reported in this series or not. In the L. R. A. many questions are treated in the notes, in text-book form, that are not treated in any of the existing text-books and encyclopedias. These are generally little points with from five to twenty cases cited; but not infrequently the authorities run up to one hundred. These selected cases are also somewhat useful for reference purposes, as many of the text-book writers are now making duplicate citations to them. Moreover, as the digests of these reports contain a table of cases reported (generally with duplicate citations) in this series, a reference to this table will show whether a decision referred to in a text-book is reported in them.

At the risk of repetition we desire to emphasize the statement that the character of the L. R. A. is not fully described by calling it a set of annotated reports. That term generally is understood to mean a set of reports with merely incidental annotation by way of comment and casual illustration of the points decided. But L. R. A. annotation, while appended to leading cases, aims to become in and of itself a complete body of law,—a series of independent notes, each complete in itself, but constituting one section of a work that shall eventually include all the law.

To secure this result each note must be an entirely exhaustive compilation of the authorities. Mr. Desty did not think this quite feasible, and in his valuable annotation of Vols. 1-13 he did not attempt to follow that plan strictly. But beginning toward the end of Vol. 13, after Mr. Desty left the reports to take up his great work on contracts, which he unfortunately did not live to finish, Mr. Rich began to put that plan into execution. Since then the notes appear to have been made with a consistent and persistent purpose to have each one show in literal truth all the case law of the United States and England on the question annotated. Taking up the questions one by one, the annotation to the series is somewhat slowly but surely drawing into itself all the decisions of American and English courts from the earliest time to the present, and presenting them analyzed, compared and summed up to show the exact state of the law on each question. The series is steadily growing into a complete library or encyclopedia of the law, in which everything is clearly analyzed and put in place, where, by the aid of careful indexing, it is ready for instant reference and use.

One thing more perhaps should be mentioned. The notes aim primarily to present a fair and accurate statement of what the courts have decided, without much editorial criticism. The editors have felt that caution and conservatism in this respect were best suited to the character of the work, and that criticism and free expression of editorial opinion were more appropriate to legal journals and reviews than to such a body of reports and annotation.

The use which the writer has made of the *L. R. A.*, both in his literary and professional work, has not been inconsiderable, and enables him to bestow upon the plan and its execution a very high degree of praise.

## OTHER BOOKS RECEIVED.

**STATE LIBRARY BULLETIN.**—University of the State of New York. *State Library Bulletin: Legislation No. 8. March 1897. State Finance Statistics, 1890 and 1895. Comparative Receipts, Expenditures, Funds and Debts.* Albany: University of the State of New York. 1897. Price, 10 cents.

**WOERNER ON GUARDIANSHIP.**—A Treatise on the American Law of Guardianship of minors and persons of unsound mind. By J. G. WOERNER, author of "the American Law of Administration." Boston: Little, Brown & Company. 1897.

This very important and timely work, written by a judge and author of distinction, will be noticed more at length in our next issue.

**SMITH ON RECEIVERSHIPS.**—The Law of Receiverships, as Established and Applied in the United States, Great Britain and her Colonies, with Procedure and Forms. By JOHN W. SMITH, Esq., of the Chicago Bar. Chicago: Lawyers' Co-operative Publishing Co. Rochester, N. Y. 1897.

**FINCH'S DIGEST OF INSURANCE CASES.**—Digest of Insurance Cases, embracing all Decisions of the United States Supreme, Appellate, and Circuit Courts, and of the Appellate Courts of the various States and Foreign Countries, in any manner affecting Insurance Companies, upon whatever plan their business may be conducted. Also, References to Annotations and to Leading Articles on Insurance in Law Journals. Vol. IX. For the year ending October 31, 1896. By JOHN A. FINCH, of the Indianapolis Bar. Indianapolis and Kansas City: The Bowen-Merrill Company. 1897.

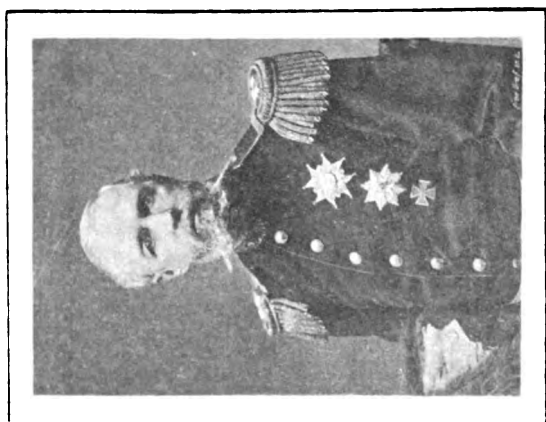
**AMERICAN STATE REPORTS, VOL. 58.**—The American State Reports, containing the Cases of General Value and Authority subsequent to those contained in the "American Decisions" and the "American Reports," decided in the courts of last resort of the several States. Selected, reported and Annotated by A. C. FREEMAN and the Associated Editors of the "American Decisions." Vol. LIII. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1897.

**DEVLIN ON DEEDS.**—A Treatise on the Law of Deeds: their Form, Requisites, Execution, Acknowledgment, Registration, Construction and Effect; Covering the alienation of Title to Real Property by Voluntary Transfer. Together with chapters on Tax Deeds and Sheriff's Deeds. By ROBERT T. DEVLIN, Counselor at Law. Second Edition, Revised and Enlarged. In Three Volumes. San Francisco: Bancroft-Whitney Co. 1897.





JUSTICE BREWER.  
LORD HERSCHELL.



KING OSCAR II.



JUSTICE COLLINS.  
CHIEF JUSTICE FULLER.

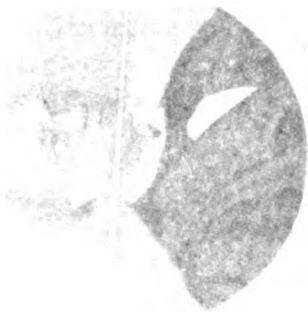
# AMERICAN LAW

JULY-AUGUST

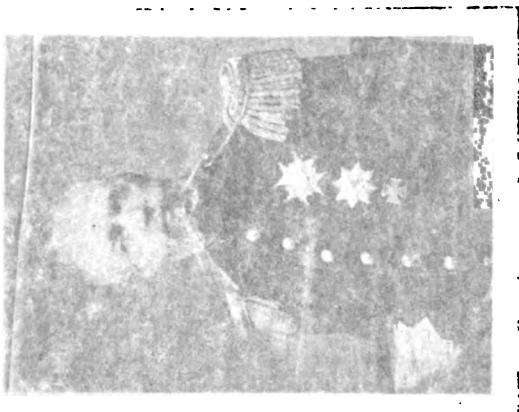
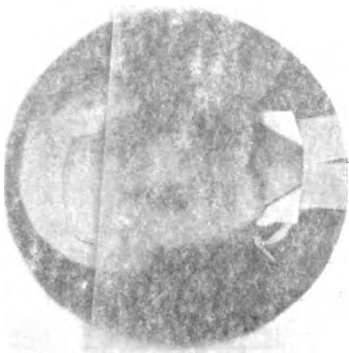
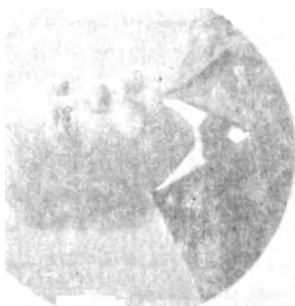
## THE VENEZUELA BOUNDARY

In a former session, the AMERICAN LAWYER has published a considerable length the account of Great Britain, the United States, and Venezuela, respectively, as to the boundary between the latter and British Guiana; and it is a significant fact that the initiative has been taken by a party having no direct interest in the controversy. The result of the diplomatic negotiations, Venezuela had to accept the boundary; while our government had assumed a policy of non-interference, the attitude of the United States was of self-constituted host friend. At the same time that an attempt was made to take different measures were contemplated, the United States, in the event of all future controversy between Great Britain and the United States; secondly, arbitration of this controversy between Great Britain and Venezuela. The United States occupies the still more prominent position of having squarely rejected the first, while declining to accept the second measures. Lord Salisbury is credited with having suggested the plan of general arbitration, and it is said that such favor with the executive branch of the government, that a treaty, substantially embodying the plan, was negotiated and signed by the outgoing Secretary of State, President Cleveland. That treaty was of the following tenor:

GENERAL  
W. H.



GENERAL  
W. H.



# THE AMERICAN LAW REVIEW.

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JULY-AUGUST, 1897.

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## THE VENEZUELA BOUNDARY ARBITRATION.

On a former occasion,<sup>1</sup> the *AMERICAN LAW REVIEW* noted at considerable length the action of Great Britain, the United States, and Venezuela, respectively, as to the disputed boundary between the latter and British Guiana; calling attention to the significant fact that the initiative had been taken by a party having no direct interest in the controversy. Throughout all the diplomatic negotiations, Venezuela had been the only real beneficiary; while our government had assumed gratuitously and voluntarily, the attitude of a mere intervenor, a sort of self-constituted next friend. At the time that article went to press, two different measures were in contemplation: first, general arbitration of all future controversies between Great Britain and the United States; secondly, arbitration of this particular controversy between Great Britain and Venezuela. To-day the United States occupies the still more anomalous position of having squarely rejected the first, while pushing the second of those measures. Lord Salisbury is credited with having originally suggested the plan of general arbitration; and his suggestion found such favor with the executive branch of our government, that a treaty, substantially embodying his plan, was actually negotiated and signed by the outgoing administration of President Cleveland. That treaty was pending for ratification,

<sup>1</sup> 30 *Am. Law Rev.* 916.



and in charge of Senator Sherman, when he was given the portfolio of State, by the present administration. It then, of course, became necessary to designate his successor, as chairman of the Senate Committee on Foreign Relations, and the place was given to Senator Davis, of Minnesota.

The latter reported this treaty to the Senate for the second time, but proposed sundry amendments, the principal one requiring the assent of the Senate before any matter could be submitted to arbitration by the President. The friends of this proposed amendment argued that a British Premier, in acting under the treaty, must always have the support of Parliament, and that a similar check should be kept on our own Executive. As thus amended, the treaty came to a final vote, May 5, 1897, and was lost; the vote stood 43 for, to 26 against ratification, and the constitution required a two-thirds majority. The principal reason assigned for defeating the measure was that general arbitration is uncalled for and unnecessary, because each controversy that arises can readily be arbitrated on its merits, precisely as the boundary dispute is now being adjusted. In other words, as already intimated, general arbitration with Great Britain (a matter in which the United States is understood to have a substantial interest), is squarely rejected by our Senate; while arbitration for the Venezuelan boundary dispute (which affects the United States, if at all, as a matter of sentiment rather than otherwise), has been somewhat officiously pushed, as follows: The events which have transpired since the publication of the former note in this REVIEW, may be grouped and recapitulated, thus: Beginning February 29, 1896, there was a world of sparring between Lord Salisbury and Secretary Olney, each maneuvering for the most advantageous position. In the course of that voluminous correspondence, Secretary Olney proposed the creation of a joint commission, composed of two English and two American judges, to hear proofs and report the facts; if the four judges thus chosen failed to agree, a fifth jurist was to be designated by the Swiss President; if the five thus chosen failed to agree, the matter was to be then referred to the Lord Chief Justice of England and the Chief Justice of the United States; and if

these two failed to agree, they must select an umpire. Lord Salisbury then suggested general arbitration; and Mr. Olney proposed to include the Venezuelan dispute. The outcome of all their diplomacy was simply this: November 12, 1896, the principles which should govern the boundary dispute were embodied in an agreement, signed by Secretary Olney and by Sir Julian Pauncefoot. Simultaneously with that agreement, Great Britain and Venezuela entered into a treaty, which provided for the immediate creation of the existing arbitration tribunal of five jurists, of whom the Judicial Committee of the British Privy Council should name two, and the President of the United States and the President of Venezuela should each name one. The four thus chosen were empowered to name the fifth; but if they failed to select within ninety days, then the Swedish-Norwegian King, Oscar II, was to umpire the controversy and preside over the tribunal. To the tribunal thus made up, both Great Britain and Venezuela covenanted to submit all their boundary dispute, and to abide the result. An award, finding the facts and applying the law, is to be made and signed by this tribunal, within three months after hearing the proofs and arguments, thus terminating a controversy of more than seventy-five years' duration.

In accordance with that treaty, Great Britain promptly named Mr. Justice Collins and Lord Herschell; the United States designated Mr. Justice Brewer, and Venezuela named Chief Justice Fuller.

#### KING OSCAR II, OF SWEDEN AND NORWAY.

In the international dispute about to be adjudicated, the subject of this sketch is, virtually, the nominee of the English-speaking race. It is understood that when the tribunal is permanently organized, he will be its central figure. Immediately at his right, will be Justice Collins; immediately at *his* right, at the extreme right end of the bench, will be Chief Justice Fuller. Immediately at King Oscar's left, will be Justice Brewer; while at *his* left, occupying the left extremity of the Bench, will be Lord Herschell.

The four men thus flanking the Scandinavian King (a Briton and an American on his right — an American and a Briton on his left), represent an English-speaking constituency of 125,000,000. These constituents have solemnly covenanted that sundry international disputes shall be submitted to, and adjudicated by the four representatives above named; and have further covenanted that, in case of disagreement among the four, such disagreement shall be umpired by King Oscar, thus making the latter, for the time being, the most prominent figure before the civilized world. The man on whom the rulers of the English-speaking race have bestowed this unmistakable token of their confidence is officially designated as Oscar II, King of Sweden and Norway. He was born January 21, 1829, and is therefore now in his sixty-eighth year, making him the senior of Chief Justice Fuller, by one year. He is the third son of Oscar I, and is now in the twenty-fifth year of his peaceful and prosperous reign, having succeeded an elder brother, Carl XV, in 1872. Among living rulers, no man has a better reputation, as an upright, liberal and large-minded man — a lover of justice for its own sake.

Among the ablest champions of arbitration to be found among public men on this side the Atlantic, was Senator Knute Nelson, of Minnesota, a native-born Norwegian, and a man of indomitable energy and will; his colleague, Senator Davis, taking charge of the treaty, when Senator Sherman was called into President McKinley's Cabinet. In the early days of treaty discussion, some of our political wiseacres confidently predicted that Lord Salisbury would never accept King Oscar as umpire, fearing that the latter's bias in favor of this country,— the Scandinavian element, which placed Knute Nelson in the Senate, being a power in American politics. And since all parties have practically agreed to accept King Oscar as umpire, those same wiseacres are constrained to admit that all the world is now estopped to deny or question Great Britain's sincerity. Indeed, it is quite generally believed in this country that, notwithstanding the signal defeat of *general* arbitration, the events which led to the formation of the present tribunal, the pre-eminent ability of all the members agreed upon, and the

peculiar method of their selection, — all tend to promote peace on earth and good will among men. It is argued that both John Bull and Brother Jonathan, more especially, have taken a new departure; have tacitly agreed that henceforth their family jars (generally bloodless, but always noisy), shall be squarely adjudicated, by men thoroughly skilled in the work of adjudication; that percussion methods shall be discarded, and the method by discussion steadily pursued; that all material facts shall be judicially weighed, estimated and measured; and that, when thus judicially ascertained, the inflexible principles of natural justice shall be applied to them. The occasion is worthy of the men; the men are worthy of the occasion: men who have adorned high places at home; who have sat in judgment on almost every conceivable form of private rights; and who are now called to come up even higher, to sit in judgment on national rights and liabilities; and to change, if need be, the map of the world. It is a striking tribute to the great and powerful profession of the law, and to the increased estimation in which that profession is held by mankind, that the weightiest international questions, and those involving strictly sovereign rights, are henceforth to be settled by lawyers and judges, and not by soldiers and diplomats. To the result of that forthcoming judicial inquiry, when duly promulgated, every loyal Briton will bow, as to a decree of the House of Lords, or an Act of the Imperial Parliament. To that result, when duly promulgated, every loyal citizen of the United States will bow implicitly, as to the Fourteenth Amendment, or any other part of the "supreme law of the land." But long before that result is reached, indeed, before the august tribunal has been long in session, King Oscar is likely to discover that, as to the equitable principles which underlie and govern the controversy, his colleagues, though strangers to him and to each other, though coming to him, as it were, from the ends of the earth, keep step as if, all their lives, they had actually touched elbows; he will perceive that, while they may not have sat at the feet of the same Gamaliel, they have all drunk at the same fountain.

## LORD HERSCHELL, G. C. B.

Sir Farrer Herschell, Baron Herschell in the Peerage of the United Kingdom, was Lord Chancellor, in the Home Rule government of Mr. Gladstone in 1886 and 1892, and in Lord Roseberry's government of 1894, which was defeated in 1895 by the Conservative government now in office.

If the political pendulum should swing back within the ordinary period, and that government be replaced by the present Liberal opposition, Lord Herschell is without a rival for the reversion of the Woolsack now occupied by Lord Halsbury. For a man to have been three times Lord Chancellor before he has reached his sixtieth year (for Lord Herschell was born in 1837), proves the possession both of talent, and of that even more enviable quality, the gift of good luck, upon which Napoleon, and his great minister, Talleyrand, insisted so strongly in appointing men to offices of importance, and which is granted to comparatively few.

The particulars of Lord Herschell's family history are not well known, and there is a vague general impression that he is connected, in some way, with the remarkable family of the Herschells, the astronomers. The only connection, however, is that both the Herschells, those with one "l" and those with two, were originally Germans of the Jewish race; a race which in recent years has, amongst other feats, contributed a Prime Minister, a Master of the Rolls (the late Sir George Jessel), perhaps the greatest English judge of this generation, and the subject of this sketch, to the list of distinguished Englishmen. Lord Herschell owes nothing to his family's social position; but he owes a great deal to his father, whose life was even more interesting than his own. At eleven years of age, Haim Herschell left home to attend a Rabbinical school, and from that time supported himself, without receiving aid from his parents.

In 1825 he was in England, traveling on foot to learn English, and, through English skeptical writings, he lost his Jewish faith, which German philosophy had previously undermined. He was ultimately converted to Christianity, in the romantic manner dear to the writers of tracts published by the Religious Tract

Society, by reading a part of the Sermon on the Mount, which had been used to wrap up a parcel. Soon afterwards he came again to England, and was baptized by the Bishop of London; not taking clerical orders, however, but occupying himself almost exclusively in mission work among the Jews. After some years of this, he opened a chapel in London where he soon collected a congregation, and organized a church. The sister of Lord Herschell, who has written, for the Dictionary of National Biography, an account of her father's life, says his belief was of the non-conformist type, but his breadth of views and catholic sympathies, attracted hearers of various opinions, and his personal influence was felt far beyond the limits of his London congregation. He was one of the founders of the society for the propagation of the gospel among the Jews, and of the Evangelical Alliance; and he was the author of a number of theological works, for the most part characteristic of the state of mind which had led him to Christianity, *e. g.*, *The Mystery of the Gentile Dispensation* and the work of the Messiah. One other work of his shows, by its title and object, the maternal influence on Lord Herschell's character: "*Far above Rubies*," a memoir of his first wife, the mother of Lord Herschell, who was a Scotswoman, the niece of a well-known Edinburg lawyer. The present writer has heard this gentleman say, that he never knew how business came to Lord Herschell in the beginning. When it did come, no further explanation of its subsequent development is needed than the talent he had inherited from his Jewish and Scottish ancestry. In his experience, added the same speaker, business, unlike promotion, cometh both from the East and from the West, without one being able to point to its origin. A story told recently by Lord Russell, the present Lord Chief Justice, is better founded than stories of the early lives of subsequently distinguished men usually are. Three young men, said Lord Russell, all on the Northern Circuit, were once dining together at an hotel in Liverpool, and were all of them despairing of their professional prospects in England, and meditating on transferring themselves to one or other of the colonies, especially if some appointment could be secured. Lord Herschell was one of those young men,

the present Speaker of the House of Commons was another, and he himself was the third. The three of them are now receiving from a country which seemed at one time to have no need for their services, about £20,000 a year. At forty, Mr. Herschell was a Queen's Counsel, and in leading practice in that class of important legal business which occupies our Appeal Court, the House of Lords, the Judicial Committee of the Privy Council, where our best lawyers, *pace* the writer of the article on "American lawyers and their making," in the March-April number of the REVIEW, mostly win their reputations, not merely in divorce and libel cases.

Lord Russell, Lord James, of Hereford, and Sir Thomas Clarke, the three men whose names have been most closely associated with great divorce and libel cases, owe no doubt their popular vogue, in part measure, to such cases, but their real professional reputation was acquired in quite a different way; and, probably, except as junior, Lord Herschell was never engaged in one. There is a famous saying of Lord Beaconsfield that, the "legal mind" is a faculty of explaining the obvious, and illustrating the commonplace. It may be true of many a man who is successful with juries, and who has no other special kind of faculty beyond the common men. But there is a type of intellect which may be called either legal or scientific according as its attention has been directed to the investigation of ethical or practical questions arising in the course of men's business, or other relations to each other, or of questions arising out of other classes of phenomena. It has always seemed to me that men like Huxley and Tyndall are essentially of the same class of mind as men like Herschell and Russell. Facility and lucidity, brilliancy of expression and skill in controversy, are undoubtedly common characteristics; and no one can doubt that Huxley or Tyndall as lawyers would have been of the same kind, and perhaps as successful—though that depends on some other considerations than natural endowments alone—as Herschell and Russell have been. The converse is not perhaps, equally obvious, but it is so easy to see the resemblance of the two scientific men to the two lawyers that I find no difficulty in supposing that the lawyers, under other circum-

stances, might have been as renowned for their science as they have become for their law.

Set Lord Herschell and Lord Russell, or the other British Commissioner on the Venezuelan boundaries, Mr. Justice Collins, to deal with the theory of the evolution of the species by natural selection, and, though these are neither obvious nor commonplace, they would, given the requisite knowledge, of course, treat them no less "scientifically" than they will the Schomburgk line.

Lord Herschell entered on a larger stage of public life when he became the member of Parliament for Durham. The sitting member had been unseated on an election petition, and on Mr. Russell (Lord Russell), his counsel, declining to stand, Mr. Herschell contested the seat, and was returned. The lawyer in Parliament is there, mostly, because he has an eye on more important legal appointments — one of the law offices of the crown, a Judgeship or perhaps the Chancellorship. Mr. Herschell was quickly in the running, and his distinction in Parliament led to his becoming Solicitor-General (as Sir Farrer Herschell), with Sir Henry James (Lord James, of Hereford), as attorney-general. Better luck no man could have had. Mr. Gladstone frightened, amongst others, his old Chancellor, Lord Selborne, and his Attorney-General, with his Home Rule policy. Lord James won a high place in public esteem by declining an office which, according to usage, was offered to him, after it was evident that Lord Selborne would not become Chancellor again.

Sir Farrer Herschell accepted it, without anyone suggesting, either openly or secretly, that "ambition had been made of sterner stuff."

Nor could it be said that Mr. Gladstone had been driven by political exigencies to appoint a Chancellor of less professional reputation than those who are usually appointed to that office. The *Law Times* expressed the opinion of the profession when it said that had the profession been called upon to nominate the Lord Chancellor, they would, it believed, have unanimously selected Sir Farrer Herschell, who, in the courts, had attained a high reputation for sound judgment and accurate



legal knowledge, and in the House of Commons had proved himself a wise counselor and able debater. To this eulogy of a legal editor of conservative politics may be added that of Lord Esher, the present Master of the Rolls, also of conservative politics, who spoke of Lord Herschell from the Bench, on an occasion when an opinion of the latter was before the court, as one of the most accomplished lawyers England has produced. Two of the most learned common law lawyers (Lord Blackburn and Lord Bramwell), were in the House of Lords when Lord Herschell first presided over it, and the pick of the professions of Scotland, Ireland and England sat there and in the Judicial Committee of the Privy Council; but Lord Herschell has never suffered by comparison with any of them; and at present his influence there, to put it certainly without exaggeration, is second to none. His Chancellorships have been noticeable for the speedy dispatch of business, without the accumulation of arrears. His coat of arms (two stags, with the motto "celeriter") is wittily expressive both of the rapidity of his mental operations, and of the course of events which have placed him in his present position. Symbolism always breaks down somewhere or other, and the stags simply make themselves ridiculous if they suppose they represent anything applicable to Lord Herschell, beyond what is implied by "celeriter."

•He knows nothing of irresolution, hesitancy, or timorousness; for he is everything that is practical, resolute, and decided.

If we miss something of the almost excessive suavity and urbanity that were so noticeable in the late Lord Coleridge and Lord Bowen, yet Lord Herschell has the easy, agreeable manners of one who has been in and of the world, and has had to fight it, but who, not having found the contest too hard, is therefore tolerant and gracious to his old enemy. The Jewish temperament, or at least such as it is to be observed in persons connected with high class Jews in London, is apparent in this: Lord Herschell, like the late Sir George Jessel, is of that band of University College students whose early years were passed whilst the theological tests at Cambridge and Oxford prevented the unorthodox from obtaining there the advantages and disadvantages of an education which stamps a kind of hall

mark on men who have undergone the process, just as the great London school, or the conditions which made it the training place of students with Jewish connections, did on the latter. Their views on most questions are of an easy kind; they are pleasantly free from affectations, and pomposities; they are critical, and calm, but also industrious, tenacious, and combative, and quickly resolved to claim and hold their own place, which they are determined shall be no small one, in the society of which they are members. Yet Lord Herschell has been as radical as it was fitting to be. If not the original author of schemes for the compulsory registration of land titles, his project is the one about which solicitors, who are chiefly interested in conveyancing, have grown most uncomfortable; but then Lord Halsbury, and the House of Lords, have adopted it, and it cannot, therefore, be considered revolutionary. He would abolish primogeniture, and assimilate the rules of real and personal property; but all this is only the shadow of what such things once were: His most destructive feat, perhaps, is that, as chairman of the commission which sat on the Metropolitan Board of Works, he gave the final blow to that now defunct body, and thus helped to prepare the way for the present London County Council.

This body, whilst holding other principles outrageous to the "city" plutocracy, clings especially to the detested principle of "betterment," and has Lord Herschell's authority for holding it to be just to set off the benefits accruing to landholders from public improvements, against the compensation they receive for disturbance. The County Council would have made Lord Herschell an alderman, but he had to decline the honor. Another commission, of which Lord Herschell was chairman, and which it may be of some interest to American readers to mention, was the Indian Currency Commission, which did *not* recommend the adoption in India of the silver standard. Lord Herschell's University has conferred upon him the highest office in its gift. He is Chancellor of London University. Other honors, such as his Knighthood of the Bath, are not sufficiently characteristic to be worthy of especial mention.

## MR. JUSTICE COLLINS.

Mr. Richard Henn Collins, Q. C., became a judge of the High Court of Justice, in 1891, when he was forty-nine years old, at precisely the same age, therefore, at which Lord Herschell was made Lord Chancellor.

His official title is used at the head of this notice, but he is, as all judges are, a Knight Bachelor, and is, therefore, Sir Richard Henn Collins in society; although on the Bench, in accordance with custom, he is "My Lord;" a mixture which must strike unaccustomed ears as being a bit of a jumble. In Scotland, James VI. (our James I.) said he made the "carles," (meaning his judges) lords; but he did not make the "carlines," (meaning their wives) ladies; but in England our judges' wives are "real ladies," and are addressed as Lady So-and-So. Mr. Justice Collins derives his unusual Christian name of "Henn" from an uncle who was a Q. C., of the Irish bar. His father, also, was an Irish Q. C.; and both father and uncle were notable men there, at the time when O'Connor was at the height of his fame, as lawyer and politician.

His father was noted as one of the most skillful of *nisi prius* advocates, and extremely learned in all the technicalities of the old system of pleading which was then common to the two countries of England and Ireland. He had a very extensive practice, and was so extremely industrious, and devoted to it, that one of those apocryphal stories which had been fathered on many individuals of like habits, has been told of him, and goes thus: That on his wedding day he took with him to his carriage a book of practice in order to consult it on his way to the church. As devoted to things legal as old Alan Fairford, the Edinburgh lawyer of Scott's "Redgauntlet," the Irish Q. C. would have been as proud of the reputation his son has obtained, as a learned and able lawyer, as the Scotsman was when the newly-fledged advocate made his first forensic appearance in the famous case of *Poor Peter Peebles v. Plainstones*. Mr. Justice Collins' reputation is mostly founded on his professional position, though he has obtained some notice as an amateur in scholarship, especially in Greek and the vexed question of its pronunciation; and

the ground on which the Turks and Greeks are now fighting is as familiar to him as the suburbs of London — probably more so.

His purely professional reputation could hardly be higher.

Appeals from his decisions are not enterprises lightly undertaken; for his knowledge is not greater than his care, patience, and zeal in investigating every case brought before him. The man of "legal mind" is not necessarily one whose decisions can always be treated as products of pure analysis. There are judges whose temperament interferes with their reasoning. They are scientific so long as some prejudice or vanity, or dislike, or caprice, or perhaps a lazy fit, does not interfere with their mental processes. When it does they are no longer "safe;" they are the judges who multiply the number of unnecessary appeals, not through stupidity, but carelessness. No judge ever sat on the bench freer from these moral, or physical defects, whichever they may be, than Mr. Justice Collins. His fairness, courtesy, and painstaking, are always spoken of with unbounded admiration; and a decision of his is as likely to be absolutely right as any conclusion of a man of flesh and blood can be. In speaking of Lord Herschell it was observed that he belonged to what may be called the Jewish group of notable lawyers at the English bar. There is an equally noticeable group of Irishmen, as strongly marked by ability, and distinctive mental and physical characteristics. They come mostly from Ulster; they are a strong, muscular, long-legged, high cheek-boned, hard-headed, determined and fighting set, with a dry, incisive, sarcastic humor; all of which forms an admirable equipment for carrying on the war for money and honors with the native-born Englishmen, whose territories they ruthlessly invade. Joined with the purely Scottish tribes, they keep up a constant raid, which no international law can stop. Lord Morris (the Irish landlord in the House of Lords), pointed out some time ago that in this court there was only one Englishman amongst about half a dozen Irish and Scotsmen. Mr. Justice Collins belongs to this Irish set, of which the other most distinguished members are Lord Russell, Mr. Justice Matthews (who may be classed with Collins for legal reputation, but who

has a fame for Irish wit and humor to which the latter can lay no claim), and Mr. Justice Day, another man noted for his saturnine humor. These three are also Roman Catholics; Mr. Justice Collins being in the opposite camp. As an advocate he ranks below all three; meaning by advocate the possessor of eloquence, and a certain glow of temperament which brings the art of advocacy within the limits of histrionics. But his reputation is greater than any of the others in the debates of pure questions of law. In this class of cases his practice has been very large, and no counsel at the common law bar was ever so frequently taken before the Chancery Division, where law assumes its most formal shape. A life spent mostly within these bounds does not present much variety of incident. Mr. Justice Collins has few of the qualities of the popular politician, and he has never been in Parliament, though he tried once, but was defeated. He is not conceivable on a party platform, as a mere party man. Lord Halsbury has been often reproved for allowing too much weight to political considerations (and also personal, it may be added), in his judicial appointments; but when he put Mr. Justice Collins on the bench, the most inveterate party man did not find fault with him. Perhaps this is a point not without importance in considering the qualifications of the two British arbitrators in the Venezuelan dispute. National bias may be difficult to get rid of in such matters, and as British arbitrators must be appointed, nobody can be blamed for that, not even for not appointing Sir Edward Clarke, who so far divested himself of national prejudice that he, though an ex-Conservative law officer, publicly supported the contentions of the Venezuelans. But as to bias in favoring a particular government, when that government has appointed one man who is a noted opponent, and the other a man who has never given himself any trouble for it, and never obtained any reward as a supporter of it, the appointments are as unexceptionable on this ground as can well be.

As to the question of ability, that is a matter which only concerns the party who appoints, and with that Great Britain has no reason to be dissatisfied. Whilst he has been confined within the narrow bounds of the various English practice, even

as an advocate Mr. Justice Collins was never, except in two cases, brought prominently into public notice; and though those raised no great constitutional questions, at least State constitutional questions, they were of considerable importance to British citizens. The first involved their right to earn their livelihood by keeping what we call a public house, and Americans a saloon, after they have once started them, unless the magistrates, assuming the right of withholding the license at discretion, can adduce some distinct and sufficient legal reason against their continuing open. This was the case of *Tharpe v. Wakefield*, which was carried to the House of Lords by the brewing interest, which Mr. Collins represented. His clients were, however, defeated, amidst the jubilation of the local optionists or vetoists.

The other was a case which approached surprisingly near to a constitutional question. Can a man lock his wife up, in order to secure to himself the pleasures of her society? If he can, what becomes of the rights of women; what becomes of the right to the franchise which they claim; and is not the question of the extension of the franchise, a high constitutional question? If he is not to be allowed to do so, what becomes of the rights of man? Mr. Jackson, of Clitheroe, in Lancashire, and his wife, at any rate were for a long time, while the case went from one court to another, as much talked about as Pym or Hampden, and the ship's-money affair. Mr. Jackson had obtained a decree for restitution of conjugal rights, which the lady would not obey; and since the law could not imprison her for disobedience, Mr. Jackson resolved to try a little imprisonment on his own responsibility. He seized her, on a Sunday morning as she was coming out of church, carried her off in a carriage, and locked her up in his own house. Mr. Collins appeared for him, on the writ of habeas corpus, and tried to persuade the judges that the law, according to certain old authorities, allowed a man to imprison his wife, and beat her "with a light switch." But the court at last told him, and the rest of the listening world, that "such quaint and absurd dicta as are to be found in the books, as to the right of a husband over his wife, in respect to personal chastisement, are not now to be cited as law, in this or any

civilized country." So Mr. Collins lost his case, and Jackson and Wife is one of the charters of British feminine freedom. There were not wanting certain of the baser sort who proclaimed it to be the death-blow to manly liberty, and darkly hinted that if the judges had been bachelors the result would have been different. The case formed a landmark in Mr. Collins' career too, for it was his last before going on the Bench. If he lost it, and *Tharpe v. Wakefield*, about the same time, he had a good many successes to the good in his record, and he began a new series as a judge.

#### MR. JUSTICE BREWER.

David Josiah Brewer, President Cleveland's nominee, though lineally descended, on the maternal side, from one of the very few "royal families" in the United States, and though intensely American in every fiber of his nature, was actually born at Smyrna, Asia Minor, June 20, 1837, his parents being at that time missionaries to the Levant.

His father, Reverend Josiah Brewer, was a born altruist, whose exemplary life was wholly devoted to the good of his fellow-men. Indeed, whatever of the altruistic spirit is now possessed by Justice Brewer (as shown, for example, by his life-long devotion to the cause of popular education), he claims "by descent" rather than "by purchase." His mother was born Emilia Field, a daughter of one of our most deservedly conspicuous American families.

The venerable senior justice, Stephen J. Field, almost the only surviving appointee of President Lincoln, is Justice Brewer's maternal uncle. Cyrus W. Field, who laid the first Atlantic cable, was another. David Dudley Field, the father of our "reformed judicial procedure," and its life-long advocate, was another. Henry M. Field, among the ablest and most conspicuous of American journalists, was still another.

Young Brewer, while yet an infant, was brought to this country, by his missionary parents. His early education was acquired in the common schools of Connecticut, a State which enjoys the peculiar distinction of having had no written constitu-

tion prior to 1818, and of having gotten along very well, indeed, without one, for some forty years — insomuch that, during that interval, she, proportionally, banked more money, built more churches, endowed more colleges, maintained more and better common schools, published more books, circulated more newspapers, and (keeping back no part of the truth), exported more wooden nutmegs, than any other member of the sisterhood of States. In 1856, young Brewer graduated, with high honors, from Yale, along with Henry B. Brown (now Mr. Justice Brown), and Chauncey M. Depew, now of the Vanderbilt railway systems. After graduating, young Brewer passed a year in the office of his uncle, David Dudley Field, then a trusted leader of the American bar. In 1858, he graduated from the Albany Law School. In June, 1859, he settled at Leavenworth, Kansas; and the blood of the hold, aggressive, energetic Fields began to tell. The following chronological summary indicates his steady, sturdy growth in public favor, and how, again and again, the sovereign people have said to him, “Come up higher : —”

In 1861, he was appointed United States Commissioner; in 1862 elected Judge of Probate; in 1864 elected District Judge; in 1865 elected Superintendent of Public Schools; in 1868 elected President of the State Teachers Association; in 1870 elected Judge of the Supreme Court of Kansas; in 1876, and again in 1882, re-elected; in 1884, appointed United States Circuit Judge. The death of Justice Stanley Matthews, which occurred eighteen days after the inauguration of President Harison, created a vacancy, which it became the duty of the latter to fill.

Judge Brewer's friends (and their name was legion), were prompt in presenting and active in pushing his claims; pointing with local yet laudable pride to the fact that he had never been defeated at the polls, and that the people among whom his life had been passed, those who actually knew him best, had never missed an opportunity to promote him.

Curiously enough, however, at this particular juncture, the Field blood appears to have stagnated, while that of the quondam missionary asserted itself vigorously: Brewer himself declined to move at all in the matter. To all the importunities of his supporters, the son of the whilom missionary persisted in saying,



*"The office was not one to be contested — being too high and sacred."* And in this unworldly policy he persisted more stubbornly than ever, when it transpired that the name of his classmate, Henry B. Brown, had been likewise submitted to President Harrison. But without any effort in his own behalf, and while steadily pursuing the even tenor of his way as a Federal circuit judge, he was duly nominated and confirmed. His commission, as an Associate Justice of the Supreme Court of the United States, bears the date of January 6, 1890; and the writer of this paragraph deems it not too much to say that, in all the long and bright array of men who have adorned that position, none ever came to it with cleaner hands than those of David J. Brewer. Meanwhile, October 14, 1890, Justice Samuel F. Miller, of almost sacred memory, passed from his labors to his reward. December 29, 1890, President Harrison duly commissioned, as Justice Miller's successor, Henry Billings Brown. And thus it came to pass, that two young men who, when Yale's commencement exercises closed in June, 1856, parted, as college classmates and warm personal friends so often part, met again, beneath the dome of the Capitol, at the close of the year 1890, to serve thenceforth as co-ordinate and equal factors in the administration of justice, within and throughout the United States. Extended comment on the career of Justice Brewer is uncalled for; to recapitulate his work would be to reproduce a very considerable portion of the juridical history of the Mississippi valley, for one-third of a century past. We venture the prediction that when the international tribunal shall have closed its labors, and the result is promulgated, Justice Brewer will be known and esteemed abroad, as he has always been at home.

#### MR. CHIEF JUSTICE FULLER.

Melville Weston Fuller, Venezuela's nominee, stands at the head of the judicial hierarchy in the United States. The sovereign people of this country have a multitude of public servants, of whom only the merest handful are "tenants for life." From among the latter, our people have singled out, and have enshrined within their heart of hearts, one, upon whom they

have bestowed the proudest title in their gift, that of "Mr. Chief Justice." The man thus segregated from his fellow-servants, and thus designated, is the most peculiar, and, to some extent, the most important factor in our scheme of popular self-government. Connected with and surrounding him are sundry traditions which may perhaps interest transatlantic readers. Whatever political issues may divide and convulse our people; whatever political organizations may rise, flourish and fade; whatever Presidents, Cabinets, and Senates may come, and may go,—Mr. Chief Justice remains. The man who, as President, elevated Brewer and Brown to the Bench, has ceased to be a direct power in the State, even though, as plain Ben. Harrison, he remains a mighty power at the bar. The man who, as President, called Melville Weston Fuller from comparative obscurity, has also ceased to be a power in the State, has resumed his old place in the ranks; and no politician is so poor as to do him reverence. The exclusive prerogatives of Mr. Chief Justice are only three in number.

He, only, can "swear in" the President; he, only, can pronounce judgment of impeachment against the President; he, only, controls the division of labor, as between himself and the associate justices. Our people are prepared to insist, with stubborn loyalty, on the inviolability and sanctity of these prerogatives, more especially the first and second.

To illustrate: When, after a lingering illness, President Garfield died unexpectedly, Vice-President Arthur, who happened to be in New York at the time, was first sworn in before some local judge. The public pulse at once quickened, feverishly. The "plain, common people," as they were so often called by Abraham Lincoln, discerned, or fancied they could discern, a "flaw in Arthur's title;" he was running counter to one of their cherished traditions; they could discern nothing which impressed them as being "livery of seizin:" Arthur had not attorned to Mr. Chief Justice. Recognizing and responding to this feeling of popular uneasiness, General Arthur, shrewd politician that he was, lost no time in "swearing in," before Chief Justice Waite.

It is not enough that Major McKinley, or any other good man,

has received an overwhelming majority at the polls; not enough that he has carried the Electoral College; he must attorn to Mr. Chief Justice.

When once a successful candidate has done that, the average citizen feels bound to salute him as "Mr. President," and assumes the right to importune him for a place. From noon until 4 p. m., on each juridical day during the term, Mr. Chief Justice is to be seen in his place, at the center of the semi-circular bench, wearing his official robes.

There, and then, he is the very embodiment of judicial dignity and power.

There, and then, he represents the "law of the land," in all its majesty, and in all its supremacy. Our people have an idea that the judicial authority "extends to all cases, at law, and in equity;" that it attaches to the unborn living child, and to the dead, unburied corpse; that it sentinels every hearthstone, with a sense of overshadowing security and peace; that its operation can nowhere be arrested, nor suspended, for even the slightest moment of time; and that its last outward visible sign is Mr. Chief Justice. Upon him our people look, even as they look upon the Stars and Stripes, with a feeling of veneration and love that is far beyond human expression. In every heart that is thoroughly loyal to the American flag there is one particular niche absolutely sacred to Mr. Chief Justice, and to him alone.

Such is the very peculiar factor which we, as a people, contribute toward a just solution of this international problem. When at 4 p. m. court adjourns, and the Chief Justice, as he often does, walks briskly along Louisiana avenue, passing Judiciary Square, and turning into Pennsylvania avenue, at the Franklin statue, he is merely an affable, courteous, cultured gentleman. The irrepressible small boy, utterly devoid of reverence for earthly dignitaries, does not hesitate to accost him, and try to sell him an evening paper. A glance at his pictured features, will show the foreign reader why it is that all children love Mr. Chief Justice; why it is that, wherever he goes, children turn to him, just as children always turned instinctively to the rugged but kindly face of Abraham Lincoln. Among our citi-

zens, the feeling is deep and abiding that neither Jefferson in his day and generation, nor Lincoln in his, was closer to the popular heart, more in touch with the plain, common people. They love and venerate the present Chief Justice for his own sake, and because he understands them, and is keenly alive to all their political and social needs.

The subject of this imperfect sketch is the eighth Chief Justice of the United States; and the feeling is wide, and steadily widening, that the great office was never in abler, cleaner, safer hands. Of the eight men who have been called to that exalted position, six had had a long and varied experience in public life, and five of them were taken from the Atlantic seaboard. The first four incumbents had all been prominent throughout the Revolutionary struggle. Ellsworth and Jay had served in Congress, and the latter had negotiated the Treaty of Peace with Great Britain. Marshall had been prominent in the Continental Army, in the Legislature of Virginia and in Congress. In 1836, when it became necessary for President Jackson to nominate the fifth Chief Justice, he named his Secretary of the Treasury, Roger Brooke Taney, of Maryland. In 1864 it became the duty of President Lincoln to nominate the sixth Chief Justice; he also named his Secretary of the Treasury, Salmon Portland Chase, of Ohio, who was the first incumbent to be taken from west of the Alleghenies. In 1874, during President Grant's second term, it became his duty to nominate the seventh incumbent. He first tendered the place to his political and personal friend, Senator Conkling, who declined absolutely. Whatever may have been his political vices or virtues, Roscoe Conkling has gone upon record as being the only man to decline the chief justiceship, when tendered under circumstances which made nomination equivalent to actual confirmation. Failing to induce his particular favorite to accept, Grant then broke away from all precedent, by nominating a man whose only experience in public life had been a brief membership in a convention called to revise the constitution of his own State. Many persons now believe that, in thus ignoring precedent, Grant builded better than he knew. Democratic lawyers, of commanding ability, have been heard to declare that Grant atoned for many political

blunders, when he nominated as seventh Chief Justice, Morrison R. Waite, of Ohio, at whose hands the more obnoxious doctrines of the Dartmouth College case met their Waterloo, if not their Appomatox. When, in 1888, it devolved on President Cleveland to nominate the eighth Chief Justice, he followed the example set by Grant, ignoring that of all former Presidents. Passing by all Cabinet ministers, skilled diplomatists, and experienced legislators, he selected a man pre-eminent at the bar before which he had practiced for more than thirty years, but otherwise wholly unknown to fame; a man whose public career was measured by a single term in the legislature of Illinois, and one term, also, in a constitutional convention of that State; a man as utterly unknown to the great body of our people, as Abraham Lincoln was when nominated.

Our present Chief Justice comes from very near the center of population. His biography, like the man himself, is extremely modest, unaffected, plain and simple. It may be summarized thus: He comes, on both sides, from the best blood of New England. The first pastor of the first church at Roxbury, Massachusetts, was Reverend Thomas Weld, an Englishman, a graduate of Cambridge, and an earnest coworker with Eliot, the Apostle. Far and wide, among the Indians of the Atlantic slope, Eliot was known as "the Teacher," and Weld as "the Preacher."

The latter is a remote ancestor of our Chief Justice. Henry Weld Fuller, paternal grandfather of our Chief Justice, was a classmate of Daniel Webster; at the time of his death he was Judge of Probate of Kennebec County, Maine. His son, Frederick Augustus Fuller, graduated from Harvard Law School and subsequently intermarried with Katherine Weston, a daughter of Chief Justice Weston, of Maine. From that intermarriage was born, at Augusta, Maine, February 11, 1833, the subject of this sketch. At the age of twenty years, young Fuller graduated from Bowdoin, and entered the law office of his maternal uncle, George M. Weston, at Bangor, Maine, and also took the course of lectures at Harvard Law School. In 1855 he formed a law partnership with his paternal uncle, Benjamin A. G. Fuller, at Augusta, Maine, and about the same time became editor of a leading Democratic journal, *The Age*. In 1856 he

was made City Solicitor and President of the Common Council, but resigned both, during that year, and settled in Chicago.

In his new location he devoted himself closely to his profession, never stepping aside, with the single exception above noted, for thirty-two years. He soon reached the very front rank, and kept it until he quitted it for the Chief Justiceship. His first appearance in the court over which he now presides was in the case of *Dows v. Chicago*.<sup>1</sup> His first argument before that court was in *Bank v. Campbell*.<sup>2</sup> The first case heard by Chief Justice Waite, *Tappan v. Bank*,<sup>3</sup> was argued by Counsellor Fuller. His last appearance at the bar was in *Railroad Company v. Keokuk Bridge Company*,<sup>4</sup> where he was associated with the venerable Lyman Trumbull.

As a matter of fact, this case was not decided until after Counsellor Fuller had been made Chief Justice. In December, 1889, he addressed both Houses of Congress, by their special invitation, at the Centennial of President Washington's inauguration.<sup>5</sup>

Such is the unpretending story of a man who, devoting himself exclusively to the practice of the law, keeping aloof from partisan politics, has been called to the highest office in the gift of the American people, and who is now, by the voluntary election of the Republic of Venezuela, an arbitrator of the long-standing boundary dispute between her and Great Britain.

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<sup>1</sup> 11 Wall. 108.

<sup>2</sup> 14 Wall. 87.

<sup>3</sup> 19 Wall. 490.

<sup>4</sup> 181 U. S. 371.

<sup>5</sup> 132 U. S. 707.

## CITIZENSHIP IN ITS INTERNATIONAL RELATION.

Citizens may be either native born or naturalized ; and citizenship is a matter which every State — a political community — regulates for itself as an incident of its sovereignty.

It is obvious from the nature of allegiance that an individual can maintain the relation to but one State at a time; but the principle of one exclusive citizenship has not yet obtained any general recognition.

As long as some States impose citizenship upon all persons born within their territory ; others upon all children born to citizen fathers ; others upon all children born to fathers domiciled within the territory ; others upon all persons who acquire domicile within their territory ; and yet others upon two or more of these various classes at the same time, — so long cases of dual citizenship will arise. Most modern States determine the nationality of a child by one of two rules, either (1) By the nationality of its parents ; or (2) By the place of its birth.

Until the close of the last century the first criterion prevailed. By reason of the greater and more frequent movement of individuals from one State to another, the second has now acquired great prevalence. The United States claim all persons born within their territory as native born citizens, whatever may have been the nationality of their parents. There are, however, exceptions to this rule, resulting from the requirement of personal subjection to the "jurisdiction thereof" — (of the United States). This excludes Indians, the children of foreign diplomatic representatives born within the limits of the United States, and the children of persons passing through or temporarily residing in this country who have not been naturalized, and who claim to owe no allegiance to the government of the United States, and take their children with them when they leave the country. None of these are subject to the "jurisdiction thereof" under the principles either of the common law or of international law. Moreover, the United States have not

adopted the test of nationality by the nationality of the parents without important modifications. For by the statute of 1855 all persons born abroad, whose fathers were at the time citizens of the United States, are deemed citizens; but citizenship thus acquired can not descend to persons whose fathers never resided in the United States. In reality, therefore, the United States have adopted neither the test by place of birth, nor that by the nationality of the parent, without important qualifications.

Citizenship by birth or nativity, however, as an international rule, adheres through life, unless terminated by expatriation or by process of law. This citizenship is always presumed to establish the nationality of an individual, and if drawn in question, it is incumbent upon him to prove any subsequent change of allegiance. Under the same rule, it may be added, that the citizenship of a dependent person is held to be that of his principal or superior. Hence the citizenship of a child, if legitimate, is that of the father; if illegitimate, that of the mother; of a ward, that of the guardian; and of a wife, that of her husband. The nationality of a married woman, however, is a question of some uncertainty. In the United States the rule of the common law still obtains; and, if a native woman marries an alien, she retains her original nationality. She may acquire her husband's nationality, but does not thereby lose her own; if, however, a foreign woman marries a citizen of the United States, she thereby becomes a citizen. In all other countries, except where the English common law prevails, the nationality of a woman, on marriage, merges in that of her husband.

The whole tendency of modern thought is to demand that every person who is a member of a particular national society shall also be a member of the State in which that society finds its political organization. Family domicile is the factor of prime importance; and it is the great defect of the *jus sanguinis* that it wholly ignores the factor. The *jus sanguinis* tends, as Lord Bacon prophetically declared, "to establish and maintain whole tribes of aliens within the territory of each State." Questions such as those of minority, legitimacy, lunacy, the validity of marriage, and the legal capacity of a married woman, are



determined by the law of domicile. The prevailing principle of private international law is, that the jural capacity of a person is determined by the law of his domicile. Though a different rule is observed in some States, which subject a resident foreigner to the law of the State to which he owes allegiance. It is claimed in behalf of this rule that allegiance is always capable of exact determination, while domicile, being partly a question of intent, is not.

There are several important exceptions to the rule that the *lex domicilii* is to determine in regard to the personal *status* and jural capacity. These exceptions arise from the unwillingness of nations to allow the enforcement within their borders of laws which are opposed to their political systems, to their principles of morality, or to their doctrine of human rights.

Domicile is defined in the civil law as "the place where a man sets his hearthstone and keeps the bulk of his property, where he intends to remain, from which, if he departs, he is said to be on a journey; where, if he returns, his journeying ends." Story, finding fault with Vattel's definition of domicile as the habitation fixed in any place, with the intention of always staying there, says: "It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom." It is often a very difficult matter to decide the question of domicile, and only a few practical rules can be laid down for determining this point,—some of the more important of which are the following:—

1. A person who is under the power of another is considered to have the domicile of the principal party, *e. g.*, a child that of the father; a wife that of the husband.

2. There is a presumption in favor of the native country, when the question lies between that and another domicile; and in favor of the place where one lives rather than in favor of his place of business.

3. Free choice is necessary; hence constrained residence is no domicile.

4. A floating purpose to leave the soil at some future period does not prevent domicil from being acquired.

Citizenship and domicile must not be confused. The terms are not synonymous. The citizen is a creature of the municipal law — the law of the State in contradistinction to international law — with which other States ordinarily have no concern. The fact of domicile determines the status of an individual from the standpoint of international law, and has no necessary connection with citizenship. For all commercial purposes, and generally for the jural capacity, the domicile of the party, without reference to the place of birth, becomes the test of national character. This has been repeatedly and explicitly admitted in the courts; and still it is a question involving much discussion and difficulty, especially in case of hostilities, due to the complicated character of commercial transactions, what state of facts constitute a residence, so as to change or fix the commercial and jural character of the party.

It is a well-defined principle that in every State a resident alien must fully obey the laws, whether of a temporary or of a permanent nature. Several States may arrange by treaty to secure for their citizens special privileges as to domicile in each other's territories, or may obtain for them special exemptions from the operation of certain municipal laws.

Again, a national character acquired by residence may be thrown off at pleasure by a return to the native country — it is an adventitious character and ceases by non-residence, or when the party puts himself in motion *bona fide* to quit the country *sine conimo revertendi*.

In the case of persons who are declared by the laws of the United States to be citizens of the United States, and who, by the laws of some other country, are also held to allegiance in that country, being persons born out of the limits and jurisdiction of the United States, but whose fathers were at the time of their birth citizens of the United States, it has been held by Attorney-General Hoar, that it is not competent for the United States to interfere with the rights of a foreign nation to the government and control of persons claimed to be its subjects, so long as they are resident in such foreign country.

According to some authorities, a man can have more than one domicile; for example, if he have establishments of equal impor-

tance in two places between which he divides his time; or he may have no domicile at all. This latter position is denied by others, on the ground that a former domicile must remain until a new one is acquired. A man may change his domicile from one country to another, and may hold property in both; he may, in a third, execute a contract to be fulfilled in a fourth; he may inherit from relations in another, and have heirs still in another. The laws of these countries and their modes of judicial procedures may differ widely. What law then shall rule where diverse laws come into conflict? A simple rule would seem to apply the law of the place of the court (*lex loci fori*, or *lex fori* alone) to all jural relations coming before it. But modern legislation and court-practice do not aim to uphold local sovereignty and jurisdiction, deciding without respect to territorial limits, according to the inner nature and needs of each jural relation. However, in the principles of the family domicile, it may be said, will be found, perhaps, the germ of the general law as to citizenship for the future.

A naturalized citizen is one who has relinquished his citizenship of nativity and has acquired a new allegiance in a State other than that of his birth. Naturalization treaties negotiated between the States differ in their provisions as to the period of residence essential to naturalization; as to liability, on returning to the native country, to trial for actions punishable by the laws of the native State, committed prior to emigration; and as to the period of residence after returning to the native country which will raise presumption of acquired citizenship.

By act of Congress, in 1868, the United States declared that "all naturalized citizens of the United States while in foreign countries are entitled to and shall receive from this government the same protection of person and property which is accorded to native born citizens." But an act of Congress cannot alter the law of nations; and that a change of allegiance does not extinguish obligations and penalties that were incurred before emigration, is a principle generally conceded by treaties on that subject.

A naturalized citizen while within the territorial limits of the United States, is entitled to all the privileges and immunities of

a native born citizen, and is eligible to every office of honor or profit with the single exception of the presidency.

But it cannot be said that he has all the rights of a native born citizen outside the territorial limits of the United States. For naturalization cannot absolve him from any legal obligations due to his former sovereignty at the time of his emigration; and he is liable to be held to the performance of such obligations should he return within a certain time to the jurisdiction of his native State.

The foundation upon which some of the European governments base their unwillingness to recognize the efficacy of naturalization laws, in protecting their subjects, when naturalized as citizens of other countries, from the operation of a military conscription on revisiting their native land, is that allegiance belongs to political and sovereign, rather than to civil or delegated jurisdiction, and therefore it is to be regarded as an individual and filial, and not as an official, tie. Indeed up to 1868, whether the former nationality of a naturalized citizen of the United States reverted on return to his native country was an open question. In modern international practice, the State does not undertake to protect the individual against the territorial law of another country while within its jurisdiction. This principle is recognized in our diplomacy by specific consular regulations; and the attempts of the United States (since 1859) to protect naturalized citizens against their original States have been successful only in so far as foreign States have recognized, by law or treaty, the right of expatriation.

Expatriation is, in strictness, an essential incident of the naturalization process. It is the process by which an individual terminates his allegiance to a particular State. According to the earliest law of the Aryan races the individual had no legal standing and was the subject of no rights, unless he happened to be the head of a family. Under the ancient doctrine, all that the individual was, he was as a member of a State — and the State was everything and the individual nothing. Plato insists that men are to be considered not as men, but as elements of the State. This dogma, in some form or other was recognized as a canon of government through all subsequent ages until

supplanted by the doctrines of the Christian Church. Under the Roman Civil Law, the citizen was but an integral part of the State; under the feudal system, he was the subject of the sovereign, who was master of the soil. The American commonwealth occupies a unique position before the world, in that it places the citizen before the State in the genesis of modern political society; each individual standing before the law the independent possessor of his own rights, except when tender age or mental imbecility require him, for his own good, to be placed under tutelage. Under the system of the United States the citizen's duties to the State are marked and defined, but he has the right to determine for himself who shall be the sovereign and in whose service these duties shall be performed. With the United States allegiance is solely political, and consequently voluntary. It is individual and not official. The citizen may remove it at any time. It belongs to political or primary jurisdiction rather than to civil or derivative jurisdiction. Hence, under the constitution, Congress alone is empowered to make uniform naturalization laws.

The act of July, 1868, declares that expatriation is, "a natural and inherent right," and that any denial or restriction of this right is "inconsistent with the fundamental principles of this government;" but the law does not indicate by what means the individual may expatriate himself. The executive has repeatedly urged upon Congress the necessity of explanatory legislation; this Congress has failed to enact, and it, therefore, seems doubtful whether an American citizen can even now expatriate himself (except under the provision of our expatriation treaties), since the law does not say how to do it. Again, this act declares the right of expatriation to be "a natural and inherent right of all people." With respect to citizens and subjects of all foreign countries, it is merely *brutum fulmen* legislation. If it was intended to (and it can have no further effect) apply only to American citizens, a much more simple and effective declaration would have been, that citizens of the United States cease to be such whenever they are duly naturalized in some foreign State.

The United States expatriation statute does not change the

common law rule. It merely asserts the "right" of expatriation. It does not say how the "right" may be converted into a fact, nor what shall be the evidence of its accomplishment.

The war of 1812 was urged in favor of the doctrine of self-expatriation, to maintain the proposition that when a man came over to this country and became a naturalized citizen, no other government had a right to recapture him. Although that was the great controversy in that war, it did not decide the question finally, as the treaty of peace left it unsettled. But the United States have gone on negotiating, writing, talking and asserting this absolute right without concession, until nearly all the governments of the world, even if they have not adopted it, have in the main abandoned the idea that a man cannot expatriate himself, and have in many cases made treaties with the United States recognizing the right. The doctrine of indelible allegiance has been either tacitly or expressly surrendered by nearly all the States that are parties to international law. This general recognition of expatriation is only a quarter of a century old, and its observance still rests either upon treaties or upon rules of municipal law.

It is a safe postulate that every man should have one and only one citizenship, and that he should be free to change it. This right is unquestionably coming to be considered as a principle of international law; but as yet it forms no part of existing international law, and each State hampers expatriation with such restrictions as it thinks fit; and this probably must continue to be the case so long as conscription laws are retained.

As the national character of an individual is determined by his citizenship, it likewise fixes his position at international law. Private international law, that decides which of two conflicting laws of different territories is to be applied in the decision of mooted questions, and that has no direct relation to international law as a code between nations, was almost unknown to the Romans and to medieval jurisprudence, but has become a large and important branch of modern jurisprudence tending more than any other to produce an acceptance of uniform principles of justice and rules of right.

As the lust of territory, wealth and power has displayed itself

more nakedly in the international relations of mankind, and as the highest virtue of the race, magnanimity, has been more slow to develop itself in those than in any other, so there are more in which a greater mental effort is required to give concrete expression in positive public law, to the universal sense of justice. The polity of international equity is definite in its aim, seeking by patient and acute observation of the facts of every international relation, to determine upon what is just and imperative. It insists upon the substitution of reason for force; upon the efficacy of law in its ethical character, as being the only permanent factor in the adjustment of the contingent circumstances which arise among the community of nations.

The relations and mutual pretensions of nations in consequence of the growth of international trade and the collision of international interests, are being subjected to a more and more trying ordeal. The practices established and the mutual concessions obtained might and should be wrought into a tolerably compact and coherent system; and diplomats, publicists and statesmen have borne testimony to the urgent necessity of accomplishing this end. It is not a little surprising, especially when we consider the advance in diplomacy, jurisprudence, statesmanship and political economy that has been made during the last century, that international law upon which the most precious interests of the nations and of all mankind depend to such an extent should to-day be found in a very crude, indefinite and incomplete condition. So long as this is the case, so long vexatious international questions are likely to be the rule, rather than the exception. Law is a natural and necessary growth of more numerous and closer human relations and the extension of industry and wealth. As nations come closer together, as their commercial relations multiply, on the one hand, and on the other the danger of destruction becomes more instant and appalling, it is inconceivable that, when they become their own law-givers, they should fail to institute a true law of nations. "Here then," even so cold a friend to political liberty as Hume is compelled to conclude, "are the advantages of free States; though a republic should be barbarous, it necessarily by an infallible operation,

gives rise to law, even before mankind have made any considerable advance in the sciences. On the contrary, in a monarchy law arises not necessarily from the forms of government. Monarchy when absolute contains even something repugnant to law." In a republic, he again says, "law necessarily arises in order to preserve liberty, to secure the persons and the properties of the citizens, to exempt one man from the domination of another, and to protect every one against the violence and tyranny of his fellow-citizens." And may we not reasonably look forward to the time when, as constitutionalism, democracy and self-government shall have driven out the last remnants of feudalism and monarchy, submission to a sound and well-defined, well-digested international code will supersede the necessity of violent expedients and "the kindly earth may slumber lapt in universal law?"

Citizenship is an attribute of national sovereignty and not merely of individual or local existence. It is a sacred right, full of grave consequences, granted with solemn formalities, and its existence should always be well defined and indisputable. Between friendly States, naturalization and expatriation should be reciprocal and attended with an equal measure of obligation. Conventional adjustment is alone adequate to the removal of the most prolific source of constantly recurring friction and tension, inevitable under the existing complications and contradictions of citizenship in its international relations. The steadily increasing interdependence of nations, especially of those given to commerce, manufactures and the advance of civilization, is a powerful influence in impressing upon them the deep meaning and philosophic truth contained in the words of Vattel: "International justice is the daughter of economic calculations."

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## LICENSE RELATING TO REAL PROPERTY, WHETHER REVOCABLE.

At law, and in many States at equity, as well, a parol license is revocable, though a consideration has been paid, or expenditures have been made on the faith of it.<sup>1</sup> Although there are

<sup>1</sup> *Wood v. Leadbitter*, 13 M. & W. 338; *Wallis v. Harrison*, 4 M. & W. 538; *Hewlins v. Shippam*, 5 Barn. & C. 221; *Bryan v. Whistler*, 8 Barn. & C. 288; *Fentiman v. Smith*, 4 East, 107. The earlier cases to the contrary, *Wood v. Lake*, *Sayers*, 3; *Taylor v. Waters*, 7 Taunt. 374, 384, are overruled.

*Colorado*: *Stewart v. Stevens*, 10 Colo. 440; 15 Pac. Rep. 786; *Ward v. Farwell*, 6 Colo. 66.

*Connecticut*: *Foot v. New Haven & N. R. Co.*, 23 Conn. 214; *Collins Co. v. Marcy*, 25 Conn. 239; *Prince v. Case*, 10 Conn. 375; 27 Am. Dec. 675.

*Delaware*: *Jackson & S. Co. v. Philadelphia, W. & B. R. Co.*, 4 Del. Ch. 180.

*Illinois*: *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; 54 Am. Rep. 243; *Tanner v. Valentine*, 75 Ill. 628; *Kamphouse v. Gaffner*, 73 Ill. 453, 461; overruling *Russell v. Hubbard*, 59 Ill. 335; *Simpkins v. Rogers*, 15 Ill. 397; *Woodward v. Seely*, 11 Ill. 157; 50 Am. Dec. 445.

*Maine*: *Seldensparger v. Spear*, 17 Me. 123; 35 Am. Dec. 234. The earlier decisions, *Ricker v. Kelly*, 1 Me. 117; 10 Am. Dec. 38; *Clement v. Durgin*, 5 Me. 9, are overruled.

*Maryland*: *Carter v. Harlan*, 6 Md. 30; *Hays v. Richardson*, 1 Gill. & J. 366.

*Massachusetts*: *Morse v. Copeland*, 2 Gray, 302; *Cook v. Stearns*, 11 Mass. 533; *Ruggles v. Lesure*, 24 Pick. 187; *Stevens v. Stevens*, 11 Met. 251; 45 Am. Dec. 208; *Clafin v. Carpenter*, 4 Met. 583; 38 Am. Dec. 381; *Nettleton v. Sikes*, 8 Met. 34.

*Michigan*: *Wood v. Michigan Air Line R. Co.*, 90 Mich. 334; 51 N. W. Rep. 263.

*Minnesota*: *Minneapolis Mill Co. v. Minneapolis & St. L. R. Co.*, 51 Minn. 304; 53 N. W. Rep. 639; *Wilson v. St. Paul, M. & M. R. Co.*, 41 Minn. 56; 42 N. W. Rep. 600; *Johnson v. Skillman*, 29 Minn. 95; 43 Am. Rep. 192; 12 N. W. Rep. 149; *Olson v. St. Paul, M. & M. R. Co.*, 38 Minn. 479; 38 N. W. Rep. 490.

*Mississippi*: *Beck v. Louisville, N. O. & T. R. Co.*, 65 Miss. 172; 3 So. Rep. 253.

*Missouri*: *Pitzman v. Boyce*, 111 Mo. 387; 19 S. W. Rep. 1104; *Desloge v. Pearce*, 38 Mo. 588. The cases of *Fuhr v. Dean*, 26 Mo. 116, and *Baker v. Chicago &c., R. Co.*, 57 Mo. 265, it is believed do not declare a different rule. The latter case was more than a license. Under the decisions of the Supreme Court, the decisions in *School District v. Lindsay*, 47 Mo. App. 134; *Gibson v. St. Louis, A. & M. Asso.*, 33 Mo. App. 165, and *House v. Montgomery*, 19 Mo. App. 170, cannot be con-

numerous decisions which hold that in equity a parol license becomes irrevocable after the licensee has expended money on the faith of it, these decisions seem opposed to sound law and to the weight of authority, both in America and in England. In a recent decision in New Jersey, Chief Justice Beasley, for the Court of Errors and Appeals, says: "If the principle that licenses of this character are to be, under conditions in question, treated as irrevocable, the same principle, if logical reasoning is to be maintained, would, of necessity, have to be extended so as to control most of the regulations of the statute of frauds. If a parol license, inefficacious by force of the act, should be rendered efficacious by reason of a losing part performance on the side of the licensee, it would be difficult to refuse, on a like ground, to apply a similar quality to a sale of goods equally within the statutory condemnation. Suppose A., a merchant, should by parol purchase a cargo of merchandise of B., to be delivered at a certain day, and, trusting in such agreement of sale, should, to the knowledge of B., proceed at great expense to

sidered as expressing the law in this State.

*New Hampshire:* Batchelder v. Hibbard, 58 N. H. 269; Taylor v. Gerrish, 59 N. H. 569; Houston v. Laffee, 46 N. H. 505; Dodge v. McClintock, 47 N. H. 383, 386; Carleton v. Reddington, 21 N. H. 291; Marston v. Gale, 24 N. H. 176. The earliest decisions to the contrary, Woodbury v. Parshley, 7 N. Y. 237; 26 Am. Dec. 739; Ameriscoggin Bridge v. Bragg, 11 N. H. 102, are overruled.

*New Jersey:* Hetfield v. Central R. Co., 29 N. J. L. 571; Lawrence v. Springer, 49 N. J. Eq. 289; 24 Atl. Rep. 983; 31 Am. St. Rep. 702; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248.

*New York:* Root v. Wadhams, 107 N. Y. 384; 14 N. E. Rep. 281; Crosdale v. Lanigan, 129 N. Y. 604; 29 N. E. Rep. 824; Miller v. Auburn & S. R. Co., 6 Hill, 61; Thompson v. Gregory, 4 Johns. 81; 4 Am. Dec. 255; Mumford

v. Whitney, 15 Wend. 381; 30 Am. Dec. 60; Wolfe v. Frost, 4 Sandf. Ch. 72, 90; Cronkite v. Cronkite, 94 N. Y. 323; Wiseman v. Lucksinger, 84 N. Y. 31; 38 Am. Rep. 479; White v. Manhattan R. Co., 139 N. Y. 19; 34 N. E. Rep. 887; Murdock v. Prospect Park R. Co., 73 N. Y. 579; Eggleston v. New York & H. R. Co., 35 Barb. 162; Houghtaling v. Houghtaling, 5 Barb. 379.

*North Carolina:* Richmond & D. R. Co. v. Durham & N. R. Co., 104 N. C. 658; 10 S. E. Rep. 669; Bridges v. Purcell, 1 Dev. & B. 492; Kivett v. McKeithan, 90 N. C. 106; McCracken v. McCracken, 88 N. C. 272.

*Rhode Island:* Foster v. Browning, 4 R. I. 47, 53; 67 Am. Dec. 505.

*Wisconsin:* Thoenke v. Fieldler, 91 Wis. 386; 64 N. W. Rep. 1080; Duinnee v. Rich, 22 Wis. 550, where the question was left undecided; Potter v. Chicago & N. W. R. Co., 20 Wis. 553; 91 Am. Dec. 444.

procure a vessel and prepare it for the voyage, would such sale be enforceable either at law or in equity? In such case it would not be pretended that, by reason of part performance and great loss, a practicable equity would arise; and yet how, in point of principle, is such supposed case distinguishable from that of one of these licenses after part performance by the licensee? The fact is, that a statute that renders legal the revocation of certain classes of contracts is founded on the theory that while, by its force, great losses will many times fall upon promisees, nevertheless such losses must be endured by such sufferers in order that the mass of the community shall be protected against worse disaster."<sup>1</sup>

The policy of the rule that a license is revocable although the licensee has acted upon it, and has expended money upon the faith of it, is declared by the Court of Appeals of New York in a recent decision: "There has been much contrariety of decision in the courts of different States and jurisdictions. But the courts in this State have upheld with great steadiness the general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is nevertheless revocable at the option of the licensor, and this although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the licensor. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable. But to change what commenced in a license into

<sup>1</sup> *Lawrence v. Springer*, 49 N. J. Eq. 289, 296; 24 Atl. Rep. 933; 31 Am. St. Rep. 708. The case of *Raritan Water Power Co. v. Veghte*, 31 N. J. Eq. 468; 19 N. J. Eq. 142, is referred to, but its applicability to the case before the

court was not perceived, for in that case the license was in writing, not by parol. In *Morton Brewing Co. v. Morton*, 47 N. J. Eq. 158; 20 Atl. Rep. 286; the vice-chancellor follows *Raritan Water Power Co. v. Veghte*, *supra*.

an irrevocable right, on the ground of equitable estoppel, is another and quite a different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed should be observed, than to leave it to the chancellor to construe an executed license as a grant depending upon what, in his view, may be equity in the special case." Accordingly, it was held that a mere verbal license given to an adjoining owner to erect a retaining wall on the licensor's land is revocable after the erection of the wall.<sup>1</sup>

A railroad company does not acquire any easement upon land by entering under a mere license from the owner and constructing its road; and a purchaser from the licensor after the road had been constructed does not take the land subject to an easement, on the ground that at the time of his purchase the land was subject to a visible incumbrance. The conveyance does not convert the license into an easement; on the contrary the conveyance is a revocation of the license. The owner of the land may revoke the license, and bring ejectment, which the railroad company may, under the statute, convert into condemnation proceedings.<sup>2</sup> In some States,—notably Wisconsin and Illinois,—either by statute or judicial decision, founded on sup-

<sup>1</sup> *Crosdale v. Lanigan*, 129 N. Y. 604, 610; 29 N. E. Rep. 824, per Earl, J. See similar statements as to the policy of the rule in *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; 54 Am. Rep. 248.

<sup>2</sup> *Minneapolis Western Ry. Co. v. Minneapolis & St. L. Ry. Co.*, 58 Minn. 128; 59 N. W. Rep. 983, per Mitchell, J.; *Watson v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 321; 48 N. W. Rep. 1129; *Lamm v. Chicago, St. P., M. & O. Ry. Co.*, 45 Minn. 71; 47 N. W. Rep. 455; *Minneapolis Mill Co. v. Minneapolis & C. Ry. Co.*, 51 Minn. 304; 53 N. W. Rep. 639; *Wood v. Michigan Air Line R. Co.*, 90 Mich. 334; 51 N. W. Rep. 263; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; 54 Am. Rep. 243; *Richmond & D. R. Co. v. Durham & N. R. Co.*, 104

N. C. 658; 10 S. E. Rep. 659; *Jackson & S. Co. v. Philadelphia, W. & B. R. Co.*, 4 Del. Ch. 180; *Hetfield v. Central R. Co.*, 29 N. J. L. 571; *Beck v. Louisville, N. O. & Tex. R. Co.*, 65 Miss. 172; 3 So. Rep. 252; *Murdock v. Prospect Park & C. I. R. Co.*, 73 N. Y. 579; *Eggleston v. New York & H. R. Co.*, 35 Barb. 162; *Stewart v. Stevens*, 10 Colo. 440; 15 Pac. Rep. 786; see § 88.

That the license cannot be revoked after the railroad company has expended money in the construction of its road, see *Messick v. Midland R. Co.*, 128 Ind. 81; 27 N. E. Rep. 419; *Campbell v. Indianapolis & V. R. Co.*, 110 Ind. 490; 11 N. E. Rep. 482; *Hornback v. Cincinnati & Z. R. Co.*, 20 Ohio St. 81.

posed consideration of public policy, a railroad company acquires a permanent easement in the land by virtue of a license to enter, acted upon by the building of its road, and any action by the landowner therefor is in effect an action to recover compensation for the permanent appropriation of the land for railroad purposes.

There is no exception to the general rule in favor of a railroad company that a license is revocable at the pleasure of the licensor where it has entered upon land under a parol license and built its road, on the ground that considerations of public policy forbid that the continuous operation of the road should be interrupted.<sup>1</sup> A common law dedication of land cannot be made to a railroad company for public use for railroad purposes.<sup>2</sup>

The owner of land abutting upon a street may by parol waive his claim to damages against a railroad company which occupies the street for its road. If the road is constructed under the consent of the owner, he cannot afterwards claim damages.<sup>3</sup>

Such abutting owner who has no title to the land of the street may, however, be regarded as abandoning his easement in the street, by executing a written license to an elevated railroad company to construct and operate its road through the street.<sup>4</sup>

A conveyance, however, of a right of way to a railroad company creates an easement or an interest in the land which passes to a grantee or mortgagee of the company, and is not a mere license which is revocable.<sup>5</sup>

A license is revoked *ipso facto* by the licensor's conveyance of the land,<sup>6</sup> or by doing any act which is inconsistent with or

<sup>1</sup> *Minneapolis Mill Co. v. Minneapolis & St. L. R. Co.*, 51 Minn. 304, 313; 53 N. W. Rep. 639, per Mitchell, J.

<sup>2</sup> *Watson v. Chicago, M., St. P. R. Co.*, 46 Minn. 321; 48 N. W. Rep. 1129.

<sup>3</sup> *Pratt v. Des Moines N. W. R. Co.*, 72 Iowa, 249; 33 N. W. Rep. 666; 32 Am. & Eng. R. Cas. 236.

<sup>4</sup> *White v. Manhattan R. Co.*, 139 N. Y. 19; 34 N. E. Rep. 887.

<sup>5</sup> *Columbus, H. & G. R. Co. v. Braden*, 110 Ind. 553; 11 S. E. Rep. 357; *Greenwood Lake & P. J. R. Co. v. New*

*York & G. L. R. Co.*, 134; N. Y. 435; 47 N. Y. St. Rep. 550, aff'g 55 Hun, 606, 8 N. Y. Supp. 26.

<sup>6</sup> *Wallis v. Harrison*, 4 M. & W. 538; *Hill v. Lord*, 48 Me. 83; *Carter v. Harlan*, 6 Md. 20; *Eckerson v. Crippen*, 110 N. Y. 585; 18 N. E. Rep. 443; *Winne v. Ulster Co. Sav. Inst.*, 37 Hun, 349; *Taggart v. Warner*, 33 Wis. 1; 53 N. W. Rep. 33; *Rice v. Roberts*, 24 Wis. 461; *Jenkins v. Lykes*, 19 Fla. 148; 45 Am. Rep. 29; *Kamphouse v. Gaffner*, 73 Ill. 453; *Drake v. Wells*,

prevents the exercise of the license.<sup>1</sup> It is revoked by the death of the licensor.<sup>2</sup> A license to a partnership is revoked by its dissolution.<sup>3</sup> A license is revoked by the commencement of an action for damages by the licensor.<sup>4</sup>

A license cannot be revoked so that the licensee will be liable in trespass for his acts done in pursuance of it.<sup>5</sup>

A license is irrevocable when it is coupled with a grant; <sup>6</sup> but even in that case it confers no interest in the land. "It may further be observed," says Baron Alderson, "that a license under seal (provided it be a mere license), is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license, it is not an incident to a valid grant, and it is therefore revocable. Thus, a license by A. to hunt in his park, whether given by deed or by parol, is revocable; it merely ren-

<sup>1</sup> Allen, 141; *Hodgkins v. Farrington*, 150 Mass. 19; 15 Am. St. Rep. 168; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Minneapolis Western Ry. Co. v. Minneapolis, St. L. Ry. Co.*, 58 Minn. 128; 59 N. W. Rep. 988; *Johnson v. Skillman*, 29 Minn. 95; 12 N. W. Rep. 149; *Wilson v. St. Paul, M. & M. R. Co.*, 41 Minn. 56; 42 N. W. Rep. 600.

<sup>2</sup> *Wood v. Leadbitter*, 18 M. & W. 838; *Hodgkins v. Farrington*, 150 Mass. 19, 21; 15 Am. St. Rep. 168; 5 L. R. A. 209; *Simpson v. Wright*, 21 Ill. App. 67; *Taylor v. Gerrish*, 59 N. H. 569.

<sup>3</sup> *De Haro v. United States*, 5 Wall. 599; *Hodgkins v. Farrington*, 150 Mass. 19, 21; 15 Am. St. Rep. 168; 5 L. R. A. 209; *Eggleston v. New York & H. R. Co.*, 35 Barb. 162; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Ruggles v. Lesure*, 24 Pick. 187.

<sup>4</sup> *Barksdale v. Hairston*, 81 Va. 764.

<sup>5</sup> *Hewlin v. Shippam*, 5 B. & C. 221, per Bailey, J.; *Lockhart v. Geir*, 54 Wis. 133; 11 N. W. Rep. 245; *Branch v. Doane*, 17 Conn. 412; *Munford v. Whitney*, 15 Wend. 380; 30 Am. Dec. 60.

<sup>6</sup> *Fuhr v. Dean*, 26 Mo. 116.

<sup>7</sup> *Wood v. Manley*, 11 Ad. & El. 34; *Doe v. Wood*, 2 B. & Ald. 724; *Hunt v. Rousmanier*, 8 Wheat. 174, 203; *United States v. Baltimore & O. R. Co.*, 1 Hughes, 138; *Metcalf v. Hart*, 3 Wyo. 513; 27 Pac. Rep. 900; 31 Pac. Rep. 407; 31 Am. St. Rep. 122; *Miller v. State*, 39 Ind. 267; *Richmond R. Co. v. Durham & N. R. Co.*, 104 N. C. 658; 10 S. E. Rep. 659, per Shepherd, J.; *Kamphouse v. Gaffner*, 78 Ill. 453, 461; *Woodward v. Seely*, 11 Ill. 157; 1 Am. Rep. 445.

ders the act of hunting lawful, which, without the license, would have been unlawful. If the license be, as put by Chief Justice Vaughan,<sup>1</sup> a license not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to come on the land; and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a water-course, to flow on the land of the licensee. In such a case there is no valid grant of the water-course, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the water-course; and if it did, then the license would be irrevocable.”<sup>2</sup>

An oral license to cut and remove trees, may be revoked by the licensor at any time before the trees are cut; but such revocation does not affect the right of the licensee to remove the trees already cut, but it terminates the license as to the trees then left standing.<sup>3</sup> As to the trees already severed the license is coupled with and supported by an interest in the property, and to that extent it is not revocable.<sup>4</sup>

A parol license is irrevocable when the conduct of the licensor has been such that the assertion of the legal title would operate as a fraud upon the licensee. Under such condition a license will be held to be irrevocable, even by those courts which adopt the general rule that a parol license is always revocable, though a consideration had been paid or there has been an expenditure of money by the licensee on the faith of the license.<sup>5</sup>

<sup>1</sup> Thomas v. Sorrell, Vaughan, 380, 351.

<sup>2</sup> Wood v. Leadbitter, 18 M. & W. 838, 845.

<sup>3</sup> 2 Jones Real Property, 1606-1609; Giles v. Simonds, 15 Gray, 441; 77 Am. Dec. 378; Cool v. Peters Box & L. Co., 87 Ind. 531; Pierrepont v. Barnard, 6 N. Y. 279; Jenkins v. Lykes, 19 Fla. 148.

<sup>4</sup> Giles v. Simonds, 15 Gray, 441; 77 Am. Dec. 378; Hill v. Hill, 118 Mass. 103; 18 Am. Rep. 455; Hill v. Cutting, 113 Mass. 107.

<sup>5</sup> Minneapolis Mill Co. v. Minneapolis & St. Louis R. Co., 51 Minn. 304, 318; 58 N. W. Rep. 639, per Mitchell, J.

To enforce an oral license in a court of equity there must be a complete and sufficient contract founded not only on a valuable consideration, but its terms must be defined by satisfactory proof accompanied by acts of part performance unequivocally referable to the supposed agreement. The acts of performance must be so clear, definite and certain in their object and design as to refer exclusively to a complete agreement of which they are a part execution.<sup>1</sup>

The doctrine that executed licenses become irrevocable was adopted in Pennsylvania at an early day and has been adhered to ever since.<sup>2</sup> A right of way over an alley was sustained as an irrevocable license, where one party had made alterations and improvements on his adjoining property, upon the faith of a mutual understanding as to the use of such alley with the adjoining owner.<sup>3</sup> Where a license to cast sawdust into a stream was shown to have induced the licensee to build his mill where it was, and in a different place from what he had intended, it was held that the license was irrevocable.<sup>4</sup> Where the owners of adjoining lots built a single building covering both lots, and the only access to the upper stories was by stairs which were altogether on one lot, it was held that the erection of such building constituted an executed license, in the nature of an easement, on the part of the owner of said lot, allowing the owner of the other lot to use such stairs.<sup>5</sup>

In other States also a license for a valuable consideration is

<sup>1</sup> *Cronkhite v. Cronkhite*, 94 N. Y. 323, 327, per Miller, J., partly in his language; *Wheeler v. Reynolds*, 66 N. Y. 227; *Wiseman v. Lucksinger*, 84 N. Y. 31; 88 Am. Rep. 479; *Eckerson v. Crippen*, 110 N. Y. 535; 18 N. E. Rep. 443.

<sup>2</sup> It first appears in *Le Fevre v. Le Fevre*, 4 Serg. & R. 241; 8 Am. Dec. 696, and was followed in *Berick v. Kern*, 14 Serg. & R. 267, a leading case; *McKillip v. McIlhenny*, 4 Watts, 317; 28 Am. Dec. 711, and *Swartz v. Swartz*, 4 Pa. St. 353; 45 Am. Dec. 697; being possibly carried to its ex-

treme in the latter case; *Ebner v. Stichter*, 19 Pa. St. 19; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 23; *Thompson v. McElarney*, 82 Pa. St. 174; *Cleland's App.*, 133 Pa. St. 189; 19 Atl. Rep. 352; *Lacy v. Arnett*, 33 Pa. St. 169; *Huff v. McCauley*, 53 Pa. St. 206; 91 Am. Dec. 203; *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732.

<sup>3</sup> *Ebner v. Stichter*, 19 Pa. St. 19.

<sup>4</sup> *Thompson v. McElarney*, 82 Pa. St. 174.

<sup>5</sup> *Cleland's App.*, 133 Pa. St. 189; 19 Atl. Rep. 352.



regarded as irrevocable when the licensee has incurred expense under it or there is a mutual agreement to do certain acts, and this has been fully performed on one side.<sup>1</sup> "A license may become an agreement on valuable consideration; as, where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not an agreement be

<sup>1</sup> *Alabama*: Rhodes v. Otis, 33 Atl. 578; 73 Am. Dec. 489.

*Arkansas*: Wynn v. Garland, 19 Ark. 23; 68 Am. Dec. 190.

*California*: McCarthy v. Mut. Relief Assn., 81 Cal. 584; 22 Pac. Rep. 938; Flickinger v. Shaw, 87 Cal. 126; 25 Pac. Rep. 268; 22 Am. St. Rep. 234.

*Georgia*: Winham v. McGuire, 51 Ga. 578; Rawson v. Bell, 46 Ga. 19; Cook v. Pridgeon, 45 Ga. 331; 12 Am. Rep. 582; Sheffield v. Collier, 3 Kelley, 82; Southwestern R. Co. v. Mitchell, 69 Ga. 114; Macon v. Franklin, 12 Ga. 239.

*Indiana*: Robinson v. Thralkill, 110 Ind. 117; 10 N. E. Rep. 647; Buchanan v. Logansport, C. & S. R. Co., 71 Ind. 265; Messick v. Midland R. Co., 128 Ind. 81; 27 N. E. Rep. 419; Campbell v. Indianapolis & V. R. Co., 110 Ind. 490; 11 N. E. Rep. 482; Saucer v. Keller, 129 Ind. 475; 28 N. E. Rep. 1117; Ferguson v. Spencer, 127 Ind. 66; 25 N. E. Rep. 1035; Lane v. Miller, 27 Ind. 534; Williamson v. Yingling, 93 Ind. 42; Clauser v. Jones, 100 Ind. 123; Simons v. Morehouse, 88 Ind. 391; Nowlin v. Whipple, 120 Ind. 596; 23 N. E. Rep. 669; 79 Ind. 481; Rogers v. Cox, 96 Ind. 157; 49 Am. Rep. 152; Hodgson v. Jeffries, 52 Ind.

334; Snowden v. Willas, 19 Ind. 10; 81 Am. Dec. 370.

*Iowa*: Harkness v. Burton, 39 Iowa, 101; Anderson v. Simpson, 21 Iowa, 399; Beatty v. Gregory, 17 Iowa, 109; 85 Am. Dec. 546; Wickersham v. Orr, 9 Iowa, 258; 74 Am. Dec. 348; Bush v. Sullivan, 3 G. Greenel. 344; 54 Am. Dec. 506.

*Nebraska*: Gilmore v. Armstrong (Neb.), 66 N. W. Rep. 998.

*Nevada*: Lee v. McLeod, 12 Nev. 280.

*Ohio*: Horuback v. Cincinnati & Z. R. Co., 20 Ohio St. 81; Wilson v. Chalfant, 150 Ohio, 248; 45 Am. Dec. 574.

*Oregon*: Baldock v. Atwood, 21 Oreg. 73; 26 Pac. Rep. 1058; Curtis v. La Grande Hydraulic Water Co., 20 Oreg. 24; 23 Pac. Rep. 808; 25 Pac. Rep. 378.

*Tennessee*: Moses v. Sanford, 2 Lea, 655.

*Texas*: Thomas v. Junction City Irr. Co., 80 Tex. 550; 16 S. W. Rep. 324; Risten v. Brown, 73 Tex. 135; 10 S. W. Rep. 661; Harrison v. Boring, 44 Tex. 255.

*Vermont*: Clark v. Glidden, 60 Vt. 702; 15 Atl. Rep. 358; Olmstead v. Abbott, 61 Vt. 281; 18 Atl. Rep. 315; Hall v. Chaffee, 14 Vt. 150; Adams v. Patrick, 30 Vt. 516; Stark v. Wilder, 36 Vt. 752; Pope v. Henry, 24 Vt. 560.

decreed in specie? \* \* \* A right under a license when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation; in which case the parties might perhaps be thought to be remitted to their former rights."<sup>1</sup>

Of course this equitable doctrine does not apply in case a licensee, without consideration, has not acted upon the license, and has incurred no material expense under it; and the license is in such case revocable at the will of the licensor.<sup>2</sup>

A license may be revoked after the licensee has enjoyed the full benefit of his expenditure.<sup>3</sup> Thus where one, by permission, laid an aqueduct to a spring on the licensor's land, and the aqueduct had decayed and required to be rebuilt to be of any value, the licensor had the right to revoke the license, because the licensee had enjoyed the full benefit of his expenditure, and the revocation would not deprive him of any right.<sup>4</sup>

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<sup>1</sup> *Rerick v. Kern*, 14 Serg. & R. 267. 271; 16 Am. Dec. 497, per Gibson, J.

<sup>2</sup> *Parish v. Kassare*, 109 Ind. 586; 10 N. E. Rep. 109; *Williamson v. Yingling*, 98 Ind. 42; *Nowlin v. Whipple*, 79 Ind. 481; *Ellsworth v. Southern Minn. R. Co.*, 81 Minn. 543; 18 N. W. Rep. 322; *Huff v. McCauley*, 53 Pa.

St. 206; 91 Am. Dec. 203; *Stoddard v. Filgur*, 21 Ill. App. 560.

<sup>3</sup> *Allen v. Fiske*, 42 Vt. 462; *Morse v. Copeland*, 2 Gray, 302; *Cowles v. Kidder*, 24 N. H. 364; 57 Am. Dec. 287.

<sup>4</sup> *Allen v. Fiske*, 42 Vt. 462, and see *Clark v. Glidden*, 60 Vt. 702, 710; 15 Atl. Rep. 358.

VALIDITY OF MARRIAGES WHERE THE CONTRACT  
IS ENTERED INTO IN A JURISDICTION OTHER THAN  
THAT OF THE DOMICILE OF THE PARTIES.

The purpose of this article is to discuss those marriages contracted in a State or country other than that of the *bona fide* domicile of the parties or one of them. There is nothing more common than marriages between persons living in different States or countries. These when entered into in good faith in the State of the domicile of either party would rarely be questioned. But it often happens that, in order to evade the local laws which prohibit, under penalties of invalidity, and often severe penal consequences, as well, all marriages entered into between parties who are related to each other within certain degrees of consanguinity, or who belong to different races, etc., the parties go to some other State or country to enter into the contract. It not unusually happens that persons living within the same State wish to marry and are met with the difficulty of surmounting the obstacles thrown in the way by the laws of their domicile forbidding the marriage in the particular case. This most often happens, perhaps, in cases where relatives agree to marry and find themselves confronted with the local laws forbidden marriages between persons so related as incestuous. A case of this kind which caused much newspaper comment occurred off the coast of California about a year ago. "There was an early morning wedding," the newspaper account of it says, "on the high seas out beyond the Golden Gate yesterday, Vincenzo Maglio and Teresa Maglio, both of Fresno, were made man and wife on board the tug Vigilant. \* \* \* The reason for going on the high seas to get married was a legal and technical one. The bride and groom are said to be within the limits of consanguinity prescribed by the statutes of California. Their exact relationship is said to be that of uncle and niece. On the high

seas contracts are governed by international law, and international law is silent on the subject of consanguinity as a bar to matrimony. The legal theory on which the couple acted in being married on the high seas was that a marriage good where contracted was good in California, and there being no law against their marriage on the high seas the claim is that it is valid there and hence valid in this State. As the purpose of going to sea was to get beyond the jurisdiction of the State of California and of the United States, care was taken to go far enough to sea, etc." The return trip was at once begun after they had gone "far enough to sea," and the whole occurrence did not require, doubtless, more than two or three hours, when all, at once, returned to the State of domicile of both parties to live. The celebrated Council of Trent, which was held in the sixteenth century, and which, while enjoying some secular representation, was composed chiefly of dignitaries of the Roman Catholic Church, in which spiritual authorities the controlling authority of the body always rested, an important decree with reference to the requisites of a valid marriage was passed. By this edict or decree all marriages contracted thereafter, which were not celebrated before the parish or some other priest, or by license of the ordinary, and before two or more persons as witnesses, were to be regarded as void absolutely. And this rule of law thus laid down prevails in most, and perhaps all, countries which recognize the supreme authority of the Roman Catholic Church in such matters. But the spiritual requirements of a valid marriage ordained by this council are not recognized in this country.<sup>1</sup> While marriage is always recognized as being of divine institution in this country, yet it is almost universally held to be a civil contract under our laws;<sup>2</sup> and the civil nature of a contract of marriage is usually

<sup>1</sup> *Hallett v. Collins*, 10 How. (U. S.) 198.

<sup>2</sup> *Territory v. Corbett*, 3 Mont. 50, 55; *Turner v. Turner*, 1 Hag. Con. 414; *Jones v. Jones*, 28 Ark. 19; *Bailey v. State*, 36 Neb. 808; 55 N. W. Rep. 241; *Clayton v. Wardell*, 4 N. Y. 230; *Dalrymple v. Dalrymple*, 2 Hag.

Con. 54; *Maryland v. Baldwin*, 112 U. S. 490; 5 Sup. Ct. Rep. 278; *Goodrich v. Cushman*, 34 Neb. 460; 51 N. W. Rep. 1041; *Gibson v. Gibson*, 24 Neb. 434; 39 N. W. Rep. 450; 4 Bl. Comm. 432; *Odd Fellows Benefit Association v. Carpenter* (R. I.), 24 Atl. Rep. 578; *Mathews v. Phoenix Iron Foundry*, 20

recognized by statute in this country. Marriage, then, being a civil contract, it must be governed by the municipal law of the State like all other contracts. This being true, the rule which is recognized in practically all jurisdictions, that a contract which is valid where executed, is to be considered and held valid in every other State or country. This wholesome rule is sustained by abundant authority.<sup>1</sup> Such a rule is absolutely necessary for the peace of society, the assurance of legitimacy and the certainty in general with which a marriage, regularly entered into in good faith according to the law of the domicile of the parties or either of them, may be universally regarded. The infinite uncertainty, confusion and complication

Fed. Rep. 281; 2 Greenl. Ev., § 460; Williams v. Williams, 46 Wis. 464; 1 N. W. Rep. 98; Cartwright v. McGown, 121 Ill. 388; 12 N. E. Rep. 737; Sharon v. Sharon, 76 Cal. 1; 16 Pac. Rep. 345; State v. Bittick, 108 Mo. 188; 15 S. W. Rep. 325; Voorhees v. Voorhees, 46 N. J. Eq. 411; 19 Atl. Rep. 172; Ridgley v. Ridgley, 79 Md. 298; 29 Atl. Rep. 579; Simon v. State, 31 Tex. Civ. App. 186; 20 S. W. Rep. 899; Holder v. State (Tex. Civ. App.), 29 S. W. Rep. 793; Sapp v. Newsom, 27 Tex. 540; McCreary v. Davis (S. C.), 22 S. E. Rep. 178; In re Strauss' Estate, 168 Pa. St. 561; 32 Atl. Rep. 98; Lutenbacher v. Lascher, 37 La. Ann. 831; Baker v. Baker, 18 Cal. 87; Londonnery v. Chester, 2 N. H. 268; Hantz v. Sealy, 6 Bin. (Pa.) 405; Lewis v. Amis, 44 Tex. 319; Rice v. Rice, 31 Tex. 174; Dumarsley v. Fishly, 3 A. K. Marsh. (Ky.) 377; Cunningham v. Burdell, 4 Bradf. 343; State v. Harris, 63 N. C. 1; Clark v. Clark, 10 N. H. 380; Bissell v. Bissell, 55 Barb. 325; Parker's Appeal, 44 Pa. St. 309; Ferlat v. Gojon, 1 Hopk. Ch. 478, 498.

<sup>1</sup> Harrall v. Harrall, 39 N. J. Eq. 279; Reimsdyk v. Kane, 1 Gall. 371; Smith v. Smith, 52 N. J. Law, 207; 19 Atl. Rep. 255; In re Lum Lin Ying,

59 Fed. Rep. 682; Jackson v. Jackson, 80 Md. 176; 30 Atl. Rep. 752; Clark v. Clark, 52 N. J. Eq. 650; 30 Atl. Rep. 81; Jackson v. Jackson (Md.), 33 Atl. Rep. 317; State v. Ross, 76 N. C. 242; Williams v. Oates, 5 Ired. (N. C.) 535; Story Conf. Laws, § 113; Succession of Cabillero, 24 La. Ann. 578; Putnam v. Needham, 8 Pick. (Mass.) 433; Medway v. Needham, 16 Mass. 157; Moore v. Hageman, 92 N. Y. 521; Stephenson v. Gray, 17 B. Mon. (Ky.) 198; Shreck v. Shreck, 32 Tex. 579; Dumarsley v. Fishly, 3 A. K. Marsh. (Ky.) 377; Campbell v. Crampton, 2 Fed. Rep. 417, 424; Scrimshire v. Scrimshire, 2 Hag. Con. 562; Ruding v. Smith, 2 Hag. 371; Steadman v. Powell, 1 Add. Ecc. 58; Fisk v. Fisk, 34 N. Y. Supp. 33; Sutton v. Warren, 10 Metc. (Mass.) 451; Hiram v. Pierce, 45 Me. 367; True v. Ranney, 41 N. H. 52; Dannelli v. Dannelli, 4 Bush. (Ky.) 51; Van Voorhis v. Britnall, 86 N. Y. 18; Boyer v. Dively, 58 Mo. 510; Morgan v. McGhee, 5 Humph. (Tenn.) 13; Johnson v. Johnson, 80 Mo. 72; Redgrave v. Redgrave, 38 Md. 93; Fornshill v. Murray, Bland Ch. 479; Greenwood v. Curtiss, 6 Mass. 353; Commonwealth v. Lane, 113 Mass. 453.

that would necessarily follow any other rule would be alarming. The rule, therefore, is grounded upon the urgent necessities of the law as well as the public policy of the State. There could be little certainty about the status of all property were it not for this salient principle. And on the other hand a marriage which is void by the laws of the place of celebration is void everywhere. The parties to a void marriage do not become legitimately married by taking up their abode in a place where, had the marriage been originally celebrated, it would have been valid. The invalidity of a void marriage attends the parties wherever they go.<sup>1</sup> The rule, however, is a general rule, and, like all general rules, has its exceptions; for, we are told, the exception proves the rule; and were it not for the exception, the rule would be self-asserting and hardly amount to a rule in fact. One vital exception to this generally accepted doctrine in our country is, the marriage must be such as is not contrary to the criminal laws or avowed policy of the State where the marriage is brought in question. "Courts of no country or State are under any obligations to enforce contracts which are contrary to good morals, or are violative of its public policy, or are forbidden by its positive law."<sup>2</sup> Let us inquire, then, if this marriage is valid under the laws of California. By statute in this State, it is enacted that "Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half, as well as the whole blood, and *between uncles and nieces* or aunts and nephews, are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate."<sup>3</sup> It will be seen at once that the marriage under consideration is incestuous and void under the

<sup>1</sup> *Alves v. Hodgson*, 7 T. R. 241; *Burrows v. Jenimo*, 2 Str. 782; *Story Conf. Laws*, § 203; 2 Kent. Comm. 458; *Tonro v. Cassin*, 1 N. & McC. (S. C.) 178; *Dyer v. Hunt*, 5 N. H. 401; *DeSobry v. Laistre*, 2 Har. & John. 191; *Desebats v. Berquier*, 1 Bin. (Pa.) 336.

<sup>2</sup> *Bowles v. Field*, 78 Fed. Rep. 742; *True v. Ranney*, 41 N. H. 52; *Kinney*

*v. Commonwealth*, 30 Gratt. (Va.) 358; *Mette v. Mette*, 1 S. W. & Tr. 416; *Brook v. Brook*, 9 H. L. 198; 2 Greenl. Ev., § 460; *The Sussex Peerage Case*, 11 C. & F. 85; *Pinnegar v. State*, 87 Tenn. 244; 10 S. W. Rep. 305; *Wharton Conf. Laws*, § 490; *State v. Bell*, 7 Bart. (Tenn.) 9.

<sup>3</sup> Cal. Civ. Code, § 59.

law of California unless it comes within some saving clause recognized by law as controlling. Incestuous marriages were regarded as voidable only, and not void, in England, until sentence of nullity for this reason was pronounced by the spiritual courts.<sup>1</sup> And it was necessary that the sentence be pronounced in the lifetime of the parties, otherwise, it would be good for all civil purposes.<sup>2</sup> But in this country we have no spiritual courts and jurisdiction in such matters is lodged, generally, in courts of chancery; the spiritual elements of a marriage are usually disregarded, and the matter is treated as of exclusive civil cognizance. In South Carolina it is held, in the absence of a statute declaring all incestuous marriages void, and in a manner after the doctrine of the old ecclesiastical courts, that the marriage between an uncle and niece which had not been dissolved during the lifetime of the parties would be considered valid to the extent that the widow could take a distributive share of the husband's estate.<sup>3</sup> And under an early statute in Illinois it was provided that "males of the age of seventeen, and females of the age of fourteen, may be joined in marriage if not prohibited by the laws of God." The court in that State, waiving the question whether the Levitical degrees were meant, thought the marriage within the same, and held it voidable.<sup>4</sup> That the parties in the case under consideration meant to evade and defeat the laws of their domicile by this marriage is apparent. Nor are such attempts uncommon in other parts of the country. In many of the States stringent laws against marriages between parties related within certain degrees of consanguinity and, sometimes, affinity, are enacted, and the penal consequences of a violation of the same are serious and severe. To avert all this, it is often attempted by parties environed by this obstacle to their happiness to flee to a State or country where the impediment does not exist, and return home to enjoy the happy felicity of married bliss in defiance of the laws of the domicile. Can the laws of the domicile be thus evaded? The

<sup>1</sup> *Aughtie v. Aughtie*, 1 Phil. Ecc. 201; 1 Bl. Comm. 434.

<sup>2</sup> 1 Bl. Comm. 434; *Aughtie v. Aughtie*, 1 Phil. Ecc. 201.

<sup>3</sup> *Bowers v. Bowers*, 10 Rich. Eq. 551.

<sup>4</sup> *Bonham v. Badgley*, 2 Gilm. (Ill.) 622.

question is one of importance, as the issue of all such marriages must be illegitimate, if the marriages are not lawful, unless there be a saving statute shielding the children of such marriages from this disgrace, which is frequently the case. Again, a more serious matter, perhaps, is the question of the criminal guilt of the parties, as well as the validity of the marriage. It was held in Massachusetts in a comparatively early case,<sup>1</sup> where a white person and mulatto, to evade the laws of that State, went to an adjoining State where such marriages were tolerated by law, entered into the contract, and then at once returned to their domicile to live, that the marriage was valid and binding because contracted in a place where such a marriage was lawful. Some sanction to a similar holding is lent by the courts of New York.<sup>2</sup> The early Massachusetts' cases received severe criticism in the House of Lords in the leading case of *Brook v. Brook*,<sup>3</sup> as well as in the case of *Marshal v. Marshal*.<sup>4</sup> In this latter case a decree of divorce had been rendered against Marshal and by the decree he was forbidden to again marry in the lifetime of his first wife under a statute forbidding second marriages in such cases. In violation of this decree and the laws of New York, which provided that no defendant in a divorce suit for adultery should marry again in the lifetime of the party in whose favor

<sup>1</sup> *Medway v. Needham*, 16 Mass. 157; *Putnam v. Sylvanus*, 8 Pick. (Mass.) 438.

<sup>2</sup> *Van Voorhis v. Britnall*, 86 N. Y. 18; *Moore v. Hegerman*, 27 Hun, 68; *Moore v. Hegerman*, 92 N. Y. 521. And in Kentucky the rule is the same as in Massachusetts and New York, but the exception to the rule that marriages positively forbidden by law as incestuous and void, and cannot be made valid by going to another State or country to celebrate same and then return to the place of domicile, is recognized. *Stephenson v. Gray*, 17 B. Mon. (Ky.) 193. And since the early cases in Massachusetts, the law-making authority, doubtless impressed with the evils which might flow from the rule tolerating an

evasion of the laws of the domicile in this way, enacted a statute providing that "When persons, resident in this State, in order to evade the preceding provisions (provisions forbidding those who have a former husband or wife living, and those related to each other within certain degrees of consanguinity and affinity, to marry, and declaring such marriages absolutely void) and with the intention of returning to reside in this State, go into another State or country, and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this State. See *Commonwealth v. Lane*, 113 Mass. 458.

<sup>3</sup> 9 H. L. Cas. 193.

<sup>4</sup> 4 Thomp. & C. 449.



the decree was rendered, and that every such second marriage should be absolutely void, Marshal fled to an adjacent State, was there married, returning immediately to the State of his domicile and continued there to live. The marriage, though it was lawful in the State where celebrated, was properly held void. Justice Westbrook among other things, pertinently said: "We assume, then, that so far as it is possible for this State to protect itself against a marriage such as this plaintiff has contracted by the force of express legislation, it has been done; and if the courts of this sovereignty are bound to respect and hold valid that which its own legislation has declared absolutely void, and to so hold in favor of one of its citizens who at the time he did the forbidden act, as such citizen owed to its laws, obedience and allegiance, then it may well be doubted whether it is able to protect its own morals or the sanctities of the married state within its own limits. Nay, it is a matter of no doubt whatever, for if the principle contended for by the plaintiff in this case is sound, then all marriages depend upon the will of the parties who have assumed these obligations, and new alliances can be again contracted and those ties again sundered as may suit the will or caprice of either." And the learned Mr. Wharton, in harmony with this contention, says; "It is not to be expected that a State, when it adopts a specific matrimonial policy, and in pursuance thereof imposes certain restrictions, should permit this policy to be defeated by citizens stepping over the line between itself and a State where such a policy is established, marrying in such State, and then returning to their own to defy the homelaw by the daily exhibition of a condition that that law condemns."<sup>1</sup> So long as a person remains a citizen of a State and looks to its laws for the protection of his person and property as well as of all private and general rights, he is subject to its laws, owes them allegiance and obedience, and this fealty he cannot shake off by a temporary absence in another State, especially when such absence is for the very purpose of defeating the operation of those laws to which he owes respect and obedience.<sup>2</sup> And any attempt to evade the laws of the domicile by a temporary trip to some

<sup>1</sup> Wharton Conf. Laws, § 181.

<sup>2</sup> In re Derrick's Estate, 36 N. Y. S. 518

other State or country will be treated as an attempted fraud upon the laws of the domicile.<sup>1</sup> The capacity of parties to contract depends upon the personal privileges and duties which attach to one by reason of his civil condition and status under the municipal law of the State or country in which he lives, and this condition attends him into whatsoever foreign country he may

<sup>1</sup> Story Conf. Laws, § 244; Wheaton Elements Intern. Law, p. 300; 2 Kent. Comm. 459; Wharton Conf. Laws, § 490; Harford v. Morris, 2 Hag. Con. 423; Wilbur v. Bingham, 8 Wash. 35; 35 Pac. Rep. 407; Campbell v. Crampton, 2 Fed. Rep. 417; Pennegar v. State, 87 Tenn. 244; 10 S. W. Rep. 305; State v. Bell, 7 Baxt. (Tenn.) 9; Kinney v. Commonwealth, 30 Gratt. (Va.) 858; Dupree v. Bouland, 10 La. Ann. 411. The extent to which one State will recognize marriages valid in another, but which, if celebrated in such State, would be void by reason of its laws, is well stated in the case of State v. Bell, 7 Baxt. (Tenn.) 9. The General Assembly of this State had passed an act forbidding as positively void marriages between white persons and negroes, as well as the living together of such persons as in the married state, and denounced upon all offenders against the law very severe penalties. The defendant, Bell, was indicted for a violation of the statute. He was a white man, and it was contended on his part that, though he had been living with the negro woman as his wife, he was married to her in Mississippi, where such marriages were tolerated by law; and the marriage being valid there, he could not be punished for living in the married state thus formed, after his removal to Tennessee. But the court, speaking through Judge Turney, said: "For the defendant, the case of Morgan v. McGhee, 5 Humph. (Tenn.) 13, is relied on. That case

only decides that marriages solemnized according to the law and usages of the country where made, are good in Tennessee. It is the manner and form of marriage, and not the capacity of the parties to contract the marriage which was passed upon. The reason for such rule is readily seen. Each State has its peculiar regulation, some more, some less strict and formal. The general rule resulting from all—that a marriage good in a place where made, after the forms and usages of that place, shall be good everywhere, is intended to prevent a mischief that would otherwise grow out of a difference of formal and local regulations. A respect for and recognition by each State, in fact nation, of the legal ceremonial of marriage in another, is all that is meant or intended by the rule. All standard authors declare the rule comes, not *ex comitate*, but *ex justitie*. Were it otherwise, each State would depend upon the concurrent legislation and adjudication of every other for the permanency and efficiency of its own. Each State is sovereign, a government within, and for itself, with the inherent and the reserved right to declare and maintain its own political economy for the good of its citizens, and cannot be subjected to the recognition of a fact or act contravening its public policy and against good morals, as lawful, because it was made or executed in a State having no prohibition against it, or even permitting it."

go for any temporary purpose; and the laws of such State or country must determine the rights of marriage belonging to such person, and these laws determine the capacity or incapacity to contract marriage, and the validity or invalidity of marriages celebrated while the parties are temporarily absent from home independently of the law of the place where the contract is made, or the law of the State or country where it is sought to be enforced.<sup>1</sup> Again, a contract is to be construed and interpreted according to the laws where the parties agree it shall be carried out. And a citizen of one State contracting with a citizen of another may agree between themselves which laws will control the agreement, and may agree upon either State in good faith.<sup>2</sup> Where, then, is a contract of marriage like those under discussion, to be performed? The parties manifestly do not intend that it be performed, though entered into, upon the high seas, or in the country to which they go temporarily to celebrate it, because the entering into a contract of marriage is but the beginning of the end. It is not performed until the death of one of the parties unless dissolved by a court of competent jurisdiction. In all cases of this kind, then, it must follow that the parties, either tacitly or expressly, contract that it shall be performed in the domicile of the parties, for they at once return there to live and take up their permanent abode, in furtherance of a previous intention, and proceed to live there just as other citizens do, and as they did before marrying. Every day of married life is a part performance of the contract of marriage. It is not the simple taking, by mutual consent of a man and woman to be husband and wife, no more than the promising to pay \$1,000.00 a year from date is performing the contract to pay. The every-day duties of support, mutual

<sup>1</sup> Wheaton, *Elements Internl. Law*, p. 194.

<sup>2</sup> 2 Kent Comm. 460; *Kellogg v. Miller*, 18 Fed. Rep. 198; *Robinson v. Bland*, 2 Burr, 1077; *Bowles v. Eddy*, 33 Ark. 645, 648; *Scudder v. Union Natl. Bank*, 91 U. S. 406; *Liverpool & Great Western Steam Co. v. Phenix Insurance Co.*, 129 U. S. 397; 9 Sup.

Ct. Rep. 480; *Pritchard v. Norton*, 106 U. S. 124; 1 Sup. Ct. Rep. 103; *Wayman v. Southard*, 10 Wheat. 48; *Allhouse v. Ramsay*, 6 Whart. (Pa.) 380, 384; *Dyer v. Hunt*, 5 N. H. 401; *Heaton v. Eldridge (Ohio)*, 46 N. E. Rep. 638; *Don v. Lippman*, 5 C. & F. 1; *Andrews v. Pond*, 13 Pet. 65.

respect, consideration and affection; fidelity to the marriage agreement; duty to the children of the union in many ways and, in short, all the obligations fixed upon the parties to the contract by operation of law constitute its performance. Its performance, then, may very properly never be said to be simply agreeing to become man and wife. Marriage is more than this, and in the nature of things, unless these legal and reciprocal duties, which are such an essential and solemn part of the performance of a marriage agreement, be intended by the parties to be performed in the place of celebration of the nuptials, it necessarily follows that the place of performance of the contract must be considered the place where the parties intend to live, not the State or country to which they flee for an hour, agree to be man and wife, and then return in post-haste to the place of their domicile, the State or country to whose laws they look for protection, and to which they owe a sacred obedience. As to marriages in general which are positively forbidden by the law of the land as contrary to the policy of the State and void, these principles, it is believed, must apply. As to the particular marriage off California, there is some, but little room for doubt, because of a statute of this State which provides that "All marriages contracted without this State, which would be valid by the laws of the country in which the same were contracted, are valid in this State."<sup>1</sup> But it will appear at once that this statute is little if anything more than declaratory of the law governing the place of contracts always in force and recognized by the courts even in the absence of statutory enactment. It is simply meant to make sure the rule that marriages of those who have been joined in matrimony in good faith according to the laws of their former domicile, will be recognized as valid in California, and doubtless had in view the wholesome purpose of averting any complications that might arise by holding the marriage of all parties who were not married under the laws of California good there, though celebrated elsewhere, and not in strict accordance with the laws and customs of California. That nothing more was intended by the legislative authority seems clear

<sup>1</sup> Civil Code Cal., § 68.

from the language of the Supreme Court of this State in construing this act.<sup>1</sup>

For the novelty of the thing, marriages are sometimes celebrated in the air — in balloons. When this is true, the marriage will be valid if the parties be directly above the jurisdiction whose laws are expected to control and the requirements of which have been complied with; for jurisdiction is not confined to things or persons actually in physical contact with the earth, but extends from a straight line beginning in the center of the earth intersecting the boundary of the State or country whose jurisdiction is in question, and extending infinitely up into space. This being true, a marriage under ground or under water, if within the jurisdiction of the country whose laws are complied with, will be as valid and binding as though celebrated at the chancel of the most sacred church edifice. But as to those marriages branded by law as incestuous and void, they cannot be legalized as by legislative enactment, we might say, simply by a trip to a place without the State for the sole purpose of making the contract and an instant return of the parties to perform and carry out a contract against the express policy of the State. Nor are the parties in such cases exempt from the criminal consequences imposed by law as a punishment for contracting incestuous or polygamous marriages.

W. C. RODGERS.

NASHVILLE, ARK.

<sup>1</sup> *Pearson v. Pearson*, 51 Cal. 120, 126. In this case, the court said: "The marriage of these parties, being valid by the law of the place where it was contracted, is also valid in this State. The statute of this State provides in terms that all marriages contracted without the State, which would be valid by the laws of the country in which the same were contracted, should be valid in all courts of this

State. The statute accords with the general principle of law theretofore prevailing. The validity of a marriage (except it be polygamous or incestuous) is to be tested by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere."

## SETTING UP FRAUD AND ILLEGALITY UNDER THE GENERAL DENIAL.

It will be recalled that, under the common law system of pleading, almost everything which went to show that no cause of action existed in the plaintiff, such as he had stated in his declaration, might be proved under what was called the general issue. Under the plea of not guilty, or of *non assumpsit*, or of *nil debet*, there lurked a thousand surprises liable to spring upon him at any moment unawares, like snakes in the grass. The primary object of the modern codes of procedure was to do away with this system of pleading, if it could be called a system, and to substitute in its place a system under which each party was required to disclose to the other the ground upon which he stood,—a system under which neither party could surprise the other by proving a state of constitutive facts without previously notifying him in his pleading that he intended to prove such facts. A miscellaneous practice of the law tends to destroy the faculty of a man for comprehensive and just reasoning. The reason is that, roughly speaking, he finds himself half of the time reasoning on the wrong side; resorting to casuistry, inventing narrow sophistries to gloze over wrongdoing, and making wrong appear to be right. This depravity of the reasoning power follows the lawyer to the bench when he becomes a judge, and depraves his judicial decisions. What I am about to say in regard to the manner in which the judges treated the new code of procedure with respect to what might be proved under the general denial, furnishes a signal illustration of this, and shows, at least in one State, a discreditable incapacity on the part of the judges to interpret a plain provision of the code. In the illustration, which I am about to give I shall confine myself to the decisions of one State; but unhappily the incapacity to grasp the real meaning of the code, as well as the inconsistency, contradiction and contrariety of decisions, are

equally illustrated by the decisions of every other State which has enacted what is called the modern code of procedure. In the face of this spectacle we may well pause and ask, "Does codification codify? Can the legislature, by stating the plainest principle in the plainest language, compel the judges to adopt it and administer it? Can it put gray matter into their brains? Can it revivify consciences which have been burned out of the human breast by long contact with the conscienceless work of the practicing lawyer? Can it redeem a subject which is 'past redemption's skill?' "

The Supreme Court of Missouri started out with a sincere effort to understand and apply the principles of the new code of procedure, which was enacted in this State in 1849. In the first decision of this court which touches upon the question I am about to discuss, the plaintiff had sued for a breach of contract on the part of the defendant in discharging him from his service before the expiration of the agreed term of employment. The court held that the defendant could not set up the defense that he was justified in discharging the plaintiff on the ground that he had been induced to make the contract through the fraud of the plaintiff, without pleading it. Said the court: "If the defendant proposes to discharge himself from the contract on the ground that he was induced to make it by the fraud of the plaintiff, he must so state." <sup>1</sup>

Soon afterwards the question again came before the court in an action upon a promissory note, where the answer was a general plea of want of consideration. It was held that, under this answer, the defendant could not prove that the note had been given in settlement of a bet or wager on an election. The court said: "It was the duty of the defendant, who relied on a statute of gaming, to state specifically the facts constituting the defense. \* \* \* He should have stated what election, between whom it was pending, and the particulars of the transaction." <sup>2</sup>

It will be perceived that if the defense which was here attempted to set up had prevailed, it would have been be-

<sup>1</sup> *Sugg v. Blow*, 17 Mo. 359, 361.

<sup>2</sup> *Sybert v. Jones*, 19 Mo. 86, 88.

cause the consideration of the note rendered it, to use the language of the judges, void *ab initio*. In other words, the note being given for a consideration forbidden by law, stood in legal casuistry as though it had never been given at all. This doctrine was followed and applied not long after in another case,<sup>1</sup> and the court kept it up and adhered to it, as I shall hereafter show, while at the same time starting the contrary doctrine and building up the two opposing doctrines side by side, like a black column by the side of a white column.<sup>2</sup>

The first aberration of the court took place in an action in the nature of trespass *de bonis asportatis*, in which the petition alleged and the answer denied the ownership of the plaintiff. Here the court held that the defense that the sale of the property, under which the plaintiff claimed title, might be shown to have been for the purpose of defrauding creditors, without specially alleging that fact in the answer. The court, speaking through Dryden, J., placed its conclusion upon the following casuistic ground: "Where a cause of action which *once existed* has been determined by some matter which subsequently transpired, such new matter must, to comply with the statute, be specially pleaded; but where the cause of action *never existed* the appropriate defense under the law is a denial of the material allegations of the petition; and such facts as tend to prove the controverted allegations are pertinent to the issue. In the case at bar the rejected testimony, if true, disproved the respondent's ownership of the property, and thereby showed that the cause of action alleged had never existed."<sup>3</sup>

Subsequently the same court applied this doctrine in an action of replevin where the defense was a general denial,—holding that the defendant might show that the goods in controversy belonged to one A.; that the defendant, as sheriff, had, prior thereto, seized them as the property of A., under an attachment in favor of the creditors of A.; that the defendant so held them at the time of the suing out of the writ of replevin; and that the plaintiffs, who claimed them as purchasers from A., under a

<sup>1</sup> Mason v. Pitt, 21 Mo. 391.

<sup>2</sup> Northrup v. Mississippi Valley Ins. Co., 47 Mo. 435; Musser v. Adler,

86 Mo. 445, and other cases to be hereafter cited.

<sup>3</sup> Greenway v. James, 34 Mo. 326, 328.



contract of sale made prior to the seizure under the attachment, had not taken possession when the attachment was levied, and that the sale was colorable, etc. This was on the theory that the sale by A. to the plaintiff, not accompanied by possession, and colorable, was void *ab initio*,— bringing the case within the rule of the case previously cited.<sup>1</sup>

This decision seems to have been the foundation of the doctrine, under the Missouri code of procedure, that, in an action of replevin, any fact which tends to disprove the plaintiff's right of possession may be shown under the general denial, and hence that fraud in the acquisition of the plaintiff's title is so provable.<sup>2</sup>

These were actions involving title to personal property, like the action of ejectment, which is the usual action to try title to land. The declaration, or petition, or complaint, as it is variously called, is drawn in the most general terms, merely stating that the plaintiff is entitled to the possession of certain described goods or of certain described land. Under this pleading the plaintiff exhibits his claim of title, whatever it may be. The defendant, under a general denial, exhibits his evidence of title, whatever it may be. So that the rule came to be that, "in the action of replevin and ejectment, under a general denial, the defendant may show that the claim of plaintiff is fraudulent and bad, and thus avoid the plaintiff's title."<sup>3</sup> The infirmity and inconvenience of this blind procedure in the action of ejectment have given rise to a rule which obtains in many jurisdictions, which allows the unsuccessful party one new trial in that action as a matter of course.<sup>4</sup>

Assuming that the Supreme Court of Missouri well decided the two cases last considered, their decision would have no application to an action upon a contract which is legal and valid on its face, and would afford no excuse for a rule of procedure that

<sup>1</sup> Young v. Glasscock, 79 Mo. 574.

<sup>2</sup> Springer v. Kleinsorge, 83 Mo.

<sup>3</sup> Stern Auction Co. v. Mason, 16 Mo. App. 473. See also Bosse v. Thomas, 8 Mo. App. 472; Edison v. Hedger, 38 Mo. App. 52, 57.

152, 156.

<sup>4</sup> 2 Thomp. Trials, § 2728.

would allow the defendant to spring upon the plaintiff any one of a hundred defenses to the action, grounded upon the fraud or illegality of the contract, which he might conclude to set up by perjury, under the general denial. It should seem that in such a case a judge ought to have the capacity to put himself in the position of the plaintiff and to look at the matter *forward* from that standpoint, instead of standing in his position of an appellate judge and looking at the matter *backward* with reference to a record where the defense set up under the general denial, though a surprise to the plaintiff, had been apparently established by truthful evidence. It should seem that a judge experienced in practice ought to have been able to see that, in an action on a promissory note, any one of a hundred different defenses might be set up which, if true, would show that it was void *ab initio*. It might be void by reason of having been given for any one of a hundred considerations, illegal, immoral or prohibited by the statute law. And yet the decisions about to be considered required the plaintiff to anticipate every one of these imaginary defenses; and the judges forgot that these defenses might not exist in fact, but might be raised wholly by perjury; and yet they laid down a rule under which the plaintiff was compelled to anticipate them, and to provide against them, and to be ready to meet them at the trial.

They applied this so-called *ab initio* doctrine in the case of actions upon contracts valid and legal upon their faces. They began by holding that, in a suit on a promissory note, the defendant may prove, under a plea of *non est factum* which the statute required to be under oath, not that he did not execute the note, but that its execution was procured from him through fraud,—the casuistic reasoning being this: “The general rule is that when a deed is void *ab initio*, and not merely voidable, the plea of *non est factum* is proper; and the facts showing the instrument to be void, may be given in evidence to sustain such plea.”<sup>1</sup>

Not long afterwards the judicial pendulum swung back, and the *ab initio* doctrine was repudiated in this relation. A con-

<sup>1</sup> Corby v. Weddle, 57 Mo. 452, 459.

tract, fair and legal on its face, was sued upon, and the defendant attempted to prove, under a general plea of a want of consideration, that it was champertous; but the court held that "it would be a sufficient answer to this contention of the defendant to show that no such defense was set forth in the answer. A general plea of want of consideration, or failure of consideration, has always been held admissible; but where the defense is that the real consideration is an illegal one, the facts constituting the illegality must be set forth."<sup>1</sup>

But the court did not get the question back upon a sound footing until some time later, when it arose in an action which had been brought to enforce an implied contract to pay a *quantum meruit* for legal services rendered by the plaintiff at the instance and request of the defendants. The answer was a general denial. The defendants attempted to raise, by an instruction, the defense that the services were illegal. The court held that this could not be done, because such a defense must be specially pleaded. The court, speaking through Black, J., said: "The character of the defense, thus interposed at the close of the trial, by prayers for instructions, was to admit that the services were rendered, but to avoid a recovery on the ground that they were illegal and contrary to public policy. Such a defense should be pleaded and an intelligent issue made thereon. Here, it is very clear that the question was raised incidentally, and that too at the close of the trial. It is not enough that evidence may appear to establish facts which, if pleaded, would defeat a recovery. The general denial puts in issue the facts pleaded in the petition, not the liability. The facts from which the law draws the conclusion of non-liability must be pleaded in the answer, when they are not stated in the petition. This defense, so far as pleading is concerned, is not unlike that of champerty, gaming, usury, and the like. It is an affirmative defense, and should be clearly and distinctly stated."<sup>2</sup> The doctrine of this case was followed by the St. Louis Court of Appeals in a case which

<sup>1</sup> Moore v. Ringo, 82 Mo. 468, 473; citing Suit v. Woodhall, 116 Mass. 547, and Dickson v. Burk, 6 Ark. 412.

<sup>2</sup> Musser v. Alder, 86 Mo. 445, 449; citing Northrup v. Mississippi Valley Ins. Co., 47 Mo. 435; Mason v. Pitt, 21 Mo. 391; Finley v. Quirk, 8 Minn. 179.

stands out as a luminous exception to a long line of contrary decisions rendered by that court, hereafter referred to.<sup>1</sup> The question thus placed on a sound footing by the decision of Mr. Justice Black, one of the strongest judges that ever sat in the Supreme Court of Missouri, ought to have been left there; but nothing more clearly proves that that court has no adequate system of consultation, but that its decisions are the decisions of single judges, than the fact that this wholesome decision stood as the law of the question but a short time. The question again came before the court in a case which had been before it once before,<sup>2</sup> and where the court had decided it correctly. The court now, ignoring the decision just referred to, where the rule was so clearly stated by Judge Black, decided the question the other way, and overruled its previous decision with a mere dash of the pen. The action was to enforce a contract in the form of a deed of conveyance of land, the consideration named being paid in monthly payments. Such contracts, as is well known, are frequent, especially in cities, and are generally perfectly valid and untainted with any illegality. But in that case the defendant attempted to show, under the general denial, that the real character of the contract was a lease and not a deed of sale, and that it was put in the form of a deed to avoid the statute against letting premises to be used as bawdy-houses. In other words, it was attempted under the general denial, to disprove the contract sued on by proving that the real contract was a different contract, which was prohibited by the statute law. The court held that this might be done.<sup>3</sup> The court made no reference to its previous decision in *Musser v. Adler*, did not give any consideration to the question on principle, but overruled its previous decision in the same case, which, on a well-known principle of appellate procedure, stood at least as the law of that case, and ought to have been adhered to, and did it with a dash of the pen. No decision can more clearly illustrate what may be done by a one-judge court and under the influence of the supreme and intense thought of the hour.

<sup>1</sup> *Cummiskey v. Williams*, 20 Mo. App. 606, 611.

<sup>2</sup> *Sprague v. Rooney*, 104 Mo. 349, 360; overruling *Sprague v. Rooney*, 82

<sup>3</sup> *Sprague v. Rooney*, 82 Mo. 468, 478. Mo. 98.

Having again perched itself on the pinnacle of the *ab initio* doctrine, one might have feared that the court would stay there; but we advance only four volumes in the series until we come to a case where it returned to the true doctrine, and in an opinion written by the same judge. In this last case the plaintiff leased certain premises to the defendant "to be used by said Association [the Amateur Athletic Association], its members, and persons to be invited by them, on Sunday the 25th day of September, for the exhibition of athletic games and other sports of the Association." The action was to recover the sum agreed to be paid as rent for the premises on the day named. The answer was a general denial. Under this answer the defendants attempted to show that the premises were let to be used for the playing of games which the statute law prohibited to be played on Sunday. In other words, an attempt was made to show, outside the contract, that the premises were let for unlawful purposes. It is thus perceived that there was absolutely no difference between this case and the case just previously cited, unless there is a difference, in juridical contemplation, between an unlawful purpose which consists in keeping a bawdy-house contrary to the statute law, and an unlawful purpose which consists in playing certain games on Sunday contrary to the statute law. Nevertheless the court now (affirming the St. Louis Court of Appeals) held that this defense could not be set up by evidence under the general denial. Said Mr. Justice Sherwood, speaking for the court: "There is nothing on the face of the petition which indicates any other than a valid contract between the plaintiff and the defendants; and, when this is the case, the rule is that, if the contract is to be invalidated by some extrinsic matter, such matter must be pleaded, in order that it may be made issuable at the trial, or that it may be considered on appeal."<sup>1</sup>

The doctrine thus again placed on a sound footing, has not been, so far as the writer knows, subsequently departed from by that court, though it has been constantly departed from by the St. Louis Court of Appeals. On the contrary, it has been

<sup>1</sup> St. Louis Agricultural &c. Asso. v. Delano, 108 Mo. 217, 220.

reaffirmed in a case which did not, nowever, arise upon a contract, but which was an action for damages founded upon negligence, in which the plaintiff set up the violation of a municipal ordinance. The defendant endeavored to show, without pleading that fact specially, that the ordinance was unreasonable; but the court held that this could not be done, saying, in the language of its previous decision in *Musser v. Adler*,<sup>1</sup> — “The facts from which the law draws the conclusion of non-liability must be pleaded in the answer when they are not stated in the petition.”<sup>2</sup>

These inconsistent and conflicting decisions of the Supreme Court of Missouri have led to a contrariety of decision between the two subordinate appellate courts of that State. The St. Louis Court of Appeals, with some wavering,<sup>3</sup> and with one clear decision to the contrary,<sup>4</sup> have held that anything may be proved under the general denial in an action on a contract, which goes to show that the cause of action never existed or that it never existed against the defendant.<sup>5</sup> For example, in a suit on a promissory note, the defendant might show, under the general denial, that the note was the note of some one else, and consequently that it was the note of the corporation of which he was president, and not his individual obligation;<sup>6</sup> or in an action on a foreign judgment, the defendant might show, under a general denial, that the foreign court had no jurisdiction over his person;<sup>7</sup> or, where the defendant was sued on a particular contract, he might, under the general denial, for the purpose of proving that the contract sued on did not exist, prove that the contract which did exist was a different contract, this being, according to the casuistry of the court, merely a means of proving a negative;<sup>8</sup> or that the contract sued on

<sup>1</sup> 86 Mo. 445, 449.

<sup>2</sup> *Bluedorn v. Missouri Pacific R. Co.*, 121 Mo. 253, 271.

<sup>3</sup> *Clafin v. Sommers*, 39 Mo. App. 419, 421; *Spengler v. Kaufman*, 48 Mo. App. 5, 15; *Carter v. Shotwell*, 49 Mo. App. 663, 668.

<sup>4</sup> *Cummiskey v. Williams*, 30 Mo. App. 606, 609.

<sup>5</sup> *Hoffman v. Parry*, 23 Mo. App. 20, 29.

<sup>6</sup> *Turner v. Thomas*, 10 Mo. App. 338, 342.

<sup>7</sup> *Crane v. Dawson*, 19 Mo. App. 214, 220.

<sup>8</sup> *Stewart v. Goodrich*, 9 Mo. App. 123, 126; *Clemens v. Knox*, 31 Mo. App. 185.

was void for fraud, this making it, in judicial contemplation, a mere nullity, something that in theory of law never existed, but was void *ab initio*;<sup>1</sup> or that the plaintiff had no title to the instrument sued on, by reason of fraud in its acquisition;<sup>2</sup> or that the note had been fraudulently transferred to the plaintiff for the purpose of avoiding the offsetting of a certain debt owing to the defendant from the original holder of the note.<sup>3</sup>

On the other hand, the Kansas City Court of Appeals appears to have adhered consistently to the doctrine that where the contract sued on is legal on its face, any matter extrinsic to it, whether existing at the time when it was made or arising subsequently, rendering it illegal, and not enforceable, must be specially pleaded.<sup>4</sup>

The analogies presented by the decisions of the Supreme Court of Missouri on some other questions are in favor of the view that all matters which go to overthrow the contract which is the subject of the suit, it being legal as pleaded, should be specially pleaded, and cannot be shown in evidence under the general denial. For example, that court has held with some wavering, that the statute of frauds must be specially pleaded; and it is a rule of pleading in that State, in actions for damages grounded upon negligence, that contributory negligence is an affirmative defense which must be pleaded,<sup>5</sup> and which hence can not be considered, unless an unavoidable inference of it arises out of the plaintiff's evidence or out of the mouths of his witnesses.<sup>6</sup>

Turning now to the decisions of other States, while no extensive search has been made among them, it is gratifying to be able to state that, so far as examined, they hold with great

<sup>1</sup> Scudder v. Atwood, 55 Mo. App. 512; White v. Middlesworth, 42 Mo. App. 360, 373, 375; First Nat. Bank v. Kansas City Lime Co., 43 Mo. App. 561, 566; Hardwicke v. Cox, 50 Mo. App. 509, 514.

<sup>2</sup> Thomas v. Ramsey, 47 Mo. App. 84, 94.

<sup>3</sup> Higgins v. Cartwright, 25 Mo. App. 609, 615.

<sup>4</sup> Reese v. Garth, 36 Mo. App. 641,

645; George v. Williams, 58 Mo. App. 138; Schwartz v. Vanstone, 62 Mo. App. 241; Quinnotte v. Ridge, 46 Mo. App. 254; Flint-Walling Mfg. Co. v. Ball, 43 Mo. App. 504.

<sup>5</sup> Donovan v. Hannibal & C. R. Co., 89 Mo. 146; Hudson v. Wabash & C. R. Co., 101 Mo. 13.

<sup>6</sup> Buesching v. St. Louis Gas Light Co., 73 Mo. 219.

unanimity — indeed, with scarcely any deviation — that in an action upon a contract, express or implied, which appears to be legal and valid on its face or as set out in the declaration, petition or complaint, the defendant cannot avail himself of the defense that the contract was illegal for any reason, whether of fraud, immorality, violation of the statute law, or the like, without clearly and precisely stating in his answer the matter upon which such fraud or illegality is predicated; and this doctrine is applied wholly without reference to the inquiry whether the fraud or illegality existed at the time of the making of the contract or arose subsequently.<sup>1</sup> Thus, in an action on an account for goods sold and delivered, the same being intoxicating liquors, it was held that the defendant could not give in evidence the fact that the liquors were sold to the defendant in another State for the purpose of being brought into the State of the forum, in violation of the statute law of that State, without being specially pleaded.<sup>2</sup> So, where in an action upon a warranty in the sale of a horse, the answer admitted the sale but denied the warranty, it was held that the defendant could not say that the contract was void because consummated upon Sunday, without specially pleading that fact by way of defense. The court said: “We hold: 1. That an answer merely by way of denial raises an issue only upon the *facts* alleged in the complaint; 2. That the denial of the sale of the horse in this case only raised an issue on the sale *in point of fact*, and not on the question of the legality of such sale; 3. That all

<sup>1</sup> *Smith v. Woodhall*, 116 Mass. 547; *Libbey v. Downey*, 5 Allen (Mass.), 299; *Cardoze v. Swift*, 118 Mass. 250; *Dickson v. Burk*, 6 Ark. 412; *Finley v. Quirk*, 9 Minn. 194; s. c. new ed. 179; *Goss v. Austin*, 11 Allen. (Mass.) 525; *Granger v. Ilsley*, 2 Gray (Mass.), 521; *Denton v. Logan*, 3 Metc. (Ky.) 484; *Smith v. Owens*, 21 Cal. 11, 28-24; *Newell v. Hayden*, 8 Ia. 140, 142; *Millbank v. Jones*, 127 N. Y. 370; *Watkins v. Clifton Hill Land Co.*, 91 Tenn. 683; *Averitt v. Elliott*, 109 N. C. 563; *Willis v. Branch*, 92 N. C. 143; *Montague v.*

*Brown*, 104 N. C. 165; *Ellison v. Rex*, 85 N. C. 77; *Brereton v. Bennett*, 15 Colo. 254; *De Votie v. McGerr*, 15 Colo. 467; *Tucker v. Parks*, 7 Colo. 70; *Miller v. Hirschberg*, 27 Ore. 522, 541; *Ah Doon v. Smith*, 25 Ore. 89; *Anderson v. Rockwood*, 62 Minn. 1; *Durham Fertilizer Co. v. Pagett*, 39 So. Car. 69; *Residence Fire Ins. Co. v. Hammond*, 37 Mich. 103; *Morley v. Liverpool &c. Ins. Co.*, 92 Mich. 590; *Norris v. Scott*, 6 Ind. App. 18, 21.

<sup>2</sup> *Suit v. Woodham*, 116 Mass. 547.



matters in confession and avoidance, showing the contract sued on to be either void or voidable in point of law, must be affirmatively pleaded."<sup>1</sup>

So, in an action by a tavern-keeper upon an account for tavern bills, drinks of liquor, money loaned, etc., it was held that evidence on the part of the defendant showing that the claim of the plaintiff was based upon a series of illegal acts in violation of the spirit and letter of the statutes regulating taverns, tippling houses, etc., and against public policy and good morals, and that therefore the contract was not enforceable, was not admissible, in the absence of any averment in the answer of such a ground of defense.<sup>2</sup> Nor could it be proved, in an action on a check, that it was given for intoxicating liquors sold in violation of a statute, unless that defense was specially pleaded in the answer.<sup>3</sup> So, where the action was upon a note given for the sale of fertilizers, it was held that the defendant could not avail himself of the defense that the plaintiff had failed to comply with the statute law regulating the sale of fertilizers, not having specially pleaded it.<sup>4</sup> So, in an action on a policy of fire insurance, the defendant could not set up the defense that the plaintiff caused the destruction of the property insured, without specially pleading it; for it was no more than reasonable that the plaintiff should have special notice of such a defense.<sup>5</sup>

Not only does the rule under consideration demand that fraud, illegality or the like, when set up as a defense to a contract legal on its face, or legal as described in the plaintiff's pleading, should be specially pleaded, but it goes further and exacts that it should be pleaded with particularity as to time, place and circumstances; in other words, that the constitutive facts upon which it is claimed the law draws the conclusion of fraud or illegality, should be distinctly set out.<sup>6</sup>

<sup>1</sup> *Finley v. Quirk*, 9 Minn. 194; new ed. 179, 188.

<sup>2</sup> *Denton v. Lyon*, 3 Metc. (Ky.) 484.

<sup>3</sup> *Bradford v. Tinkham*, 6 Gray (Mass.), 494.

<sup>4</sup> *Durham Fertilizer Co. v. Pagett*, 39 S. C. 69.

<sup>5</sup> *Residence Fire Ins. Co. v. Hammond*, 37 Mich. 103; *Morley v. Liverpool &c. Ins. Co.*, 93 Mich. 590.

<sup>6</sup> *Fred. Miller Brewing Co. v. Utz*, 46 Ill. App. 448 (fraud); *Norris v. Scott*, 6 Ind. App. 18; *Disbrow v. Harris*, 123 N. Y. 362, 366; *Nichols v. Stevens*, 123 Mo. 96, 117.

This rule of pleading is not inconsistent with the doctrine that where an unavoidable inference arises out of the plaintiff's own evidence that the contract which he asks the court to enforce is void, as being contrary to public policy, to sound morals or to the statute law, the court will not lend its aid to the enforcement of it. On this subject it has been said that "no waiver by the defendant, or consent of parties, can oblige a court of justice to enforce a claim, which, upon the plaintiff's own showing, has no foundation in law."<sup>1</sup> In other words, a plaintiff, suing upon a good contract, cannot recover by proving a bad one.<sup>2</sup> But even here there has been some judicial aberration,<sup>3</sup> though there should not be, provided the illegality be plain and the inference of it unavoidable.

SEYMOUR D. THOMPSON.

ST. LOUIS, MO.

<sup>1</sup> *Cardoze v. Swift*, 118 Mass. 250, 252.

<sup>2</sup> *Libby v. Downey*, 5 Allen (Mass.), 289. See also in support of this principle, *Scudder v. Atwood*, 55 Mo. App. 522; *Smith v. Owens*, 21 Cal. 11, 24; *Ah Doon v. Smith*, 25 Ore. 89 (VS); *Drake v. Siebold*, 81 Hun (N. Y.), 178; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Russell v. Burton*, 68 Barb. (N. Y.) 539; *Sheldon v. Preussner*, 52 Kan.

579; *Miller v. Hirschberg*, 27 Ore. 523, 541.

<sup>3</sup> *Musser v. Adler*, 86 Mo. 445, 449. Another court, speaking with reference to a defense founded in public policy, said: "An affirmative defense is of no avail, if not pleaded, though the testimony discloses it." *Schwartz v. Vanstone*, 62 Mo. App. 241; citing *Dingliedein v. R. Co.* 9 Bosw. (N. Y.) 79.

**"THE PROGRESS OF THE LAW" — A REPLY.<sup>1</sup>**

The style of this production is unexceptionable. It is both pithy and terse, and lays bare many of the blemishes of our ancient jurisprudence. For this reason it is instructive; but, on the whole, it is too shrewish on our ancient masters in the profession, too pessimistic in its views of the old, and too lavish in its praise of the new.

What have we gained by the changes in pleading at law, of which he is so eulogistic? In its true analysis, it comes to this: the name, simply the name, of the action is lost. All else, with here and there an exception, is retained. Mr. Justice Clark virtually admits this himself and bewails most loudly that the reform was intrusted to the old-time jurist. We must have stable rules for construction, rules by which the point and pith of the contention can be drawn to a focus and all matters irrelevant and foreign to the issue sloughed off. Every rule of pleading is second to this end, whether you give a name to the action or not. Those rules are a part of the principles and wisdom of the old common law. They are essential under any system of pleading, and can no more be discarded by a lawyer at his desk or a judge on the bench than a speaker can hope to run an assembly without parliamentary law. As well expect a strong and polished essay, such as I am now reviewing, from a jumble of letters cast at random. It is the application of rules or principles which produce such results. Not only this, but with it a mental mechanism such as Mr. Justice Clark alone possesses. It is this which separates the work of one mind from another. It is impossible for one mind to capture the individuality of another.

I am not in love with the jumbling of common law and chancery jurisdiction. We have them separated here in Tennessee.

<sup>1</sup> A reply to the article in our last number entitled "The Progress of the Law," by Mr. Justice Walter Clark, of the Supreme Court of North Carolina.

It is a pretty piece of fancy to talk about being walked from one court to another; but my experience is, that I never had even a sensible client but knew one jurisdiction from another as well as he did a cow from a horse. It would be a curiosity to see a Tennessee lawyer walking the gangway from one court to the other. Most of our litigation about property and contracts is in the chancery court. The jurisdiction is by statute concurrent with courts of law in all civil cases not sounding in damages. The evidence is all in writing, except in divorce cases. No need, as a general rule, for a bill of exceptions, which often shadows truth. We have no jury, which often retards progress; no surprises in proof. A chancery court, organized as ours, will decide more cases and more satisfactorily in three days than can a court of law with its jury and oral proof in so many weeks. Instead of abolishing the chancery courts and blending it, as wheat and corn in the same field, we have reformed it.

Another great advantage is this. In this court neither suitor or solicitor has to stand back and wait (he knows not how long) until the jury cases are all ended, which have precedence on the docket of his own case.

Neither am I of those who believe that we are indebted to Rome or the Pandects for the body of our common law. Chancellor Kent is the leader in this belief. Sir John Fortescue is the leader of the faith that our system is wholly independent in its origin, development and growth; and Sir William Blackstone stands in the middle of these two ultra views, agreeing with Sir John that it was independent in origin and structure, but vastly enriched from the civil law.

The body of our common law is not the narrow outcome of a barbarous people and a barbarous civilization, as one would gather from the gist of Mr. Justice Clark's essay. Nor does it consist of one boozy judge making precedents for another boozy judge to follow; for it is a maxim that things introduced contrary to the rule of law, ought not to be used as precedents. It is another maxim that precedents that pass *sub silentio* are of little or no authority.

How any one who reads the vast array of legal principles known and acted on by our old judges and law-writers: princi-

ples deep enough, broad enough and supple enough to reach and grasp and exactly fit new conditions of life undreamed of by them, can say they are narrow and barbarous,—surpasses my comprehension.

It is known that the Catholic clergy of England, with all their power, attempted to supersede the common law with that of Romish origin, and that it was the permanent location of the higher courts at Westminster which foiled them in this design. The Danes and the Normans, tyrants and stuffed with slavish maxims, for a while put them in practice on English soil and did succeed in engrafting some blemishes on its jurisprudence, but at the first opportune moment they shook off the tyranny and returned as far as practicable to the old landmarks. Will you tell me, in the face of these historic truths, so well known to Sir William Blackstone, that office and its pelf influenced him to write in praise of his country's laws? I will never so believe. More than one century gone this great jurist asserted that no people grounded in our ancient common law would permanently accept the rule of a despot. Name, if you can, a people since then who have.

Where did this admirable and comprehensive system of jurisprudence come from? Where did our fathers get it? It started, grew and prospered long before the renaissance of learning. It was the product of a people isolated, and whom Rome in her pride and insolence called barbarian. Sir John Fortescue and Blackstone and many great legal lights believe the system theocratic, born of a study and practice of rules of right garnered from the Bible. There they gleaned the greatest and best of all political axioms, that a "nation without law is a nation without liberty," as Samuel told the Jews when they would have Saul anointed king. It is said that the apostle Paul planted Christianity on this island. In line with this assertion, are some of the common law maxims, "*summa ratio (lex) est, quae pro religione facit*" (the highest law is that which supports religion); "*lex est ab Aeterno*" (law is from the Eternal); "*Veritas, a quocunque dicitur, a Deo est*" (truth, by whomsoever pronounced, is from God).<sup>1</sup>

<sup>1</sup> 4 Inst. 153.

Now, do not undertand me to say that Fortescue, Blackstone, or any one else asserts that any absurdity or other blemish in this jurisprudence is theocratic in origin. Such are human exotics, put there by human agencies. It is the business of the reformer to prune away all of those. No jurist will object to this. But such will and ought to protest, when it is seen that, in the name of reform, the best is sought to be destroyed. It is known that the bulk of the civil law and common law, and especially the portion of each on the rights and duties of man as a member of the body politic, are almost identical. This seems to indicate a common origin as to this part of each system. The law of the Twelve Tables is the nucleus of the civil law. This was the product of wise men who had made a special study of the laws and institutions of Greece; and these, as exotics, were garnered by Solon, Lycurgus, Simonides and others, from Egypt. Here they sipped from golden goblets, as it were, the wine of legal wisdom given them by the priest of this land, which they in turn obtained from Israel while sojourning in this country. Those priests knew well the true God; knew his attributes; knew well the duty which man owed his Maker and the duties man owed his brother man, but suffered him to worship beast or reptile, anything which would awe, subject or brutalize; make him an obedient slave to the ruling class. Distinguished strangers were welcomed to the fountain; were suffered to master all of this lore; but the fellah who toiled in quarry or field was doomed without pity to the lowest depths of ignorance and idolatry.

Here is a fact I wish not to be forgotten. While the Twelve Tables and all accessions which jurisconsults gave to the nucleus of law, as well as the edicts and rescripts piled on it by the Cæsars, lay as rubbish unread and unknown in monkish cloisters, the common law sprang up as a giant and is with us to-day. It is a system of law which the people made, which in its last analysis is but the ideas of right and wrong entertained in common by the wisest and best thinkers in times past and present. It is a mistake to say it is judge-made. The office of the judge is to find out what this common opinion is on the point before him, and then declare it. If he is able, thorough, learned and

impartial in this inquiry, his opinion becomes a precedent; otherwise, not. If Mr. Justice Clark aims to assert that a boozy judge can make such a precedent, I differ with him *toto coelo*. I confess I am proud of our law as a system. I am proud of its origin. It had no barbarian for its parent. It is a work beyond the conception or power of a barbarian. America for centuries was the home of the true barbarian. In Asia and Africa he has been and is now. In Europe he has been by no means a stranger. But it is true that, wherever he has been, he has not erected his temple of justice, — no code of laws protecting life, person or property.

Yet we find such a code, such temples among our English ancestors, at a time when Roman law was buried out of sight of man, with no one of its learned disciples left to teach it. It must be the fruit of Bible culture. I wish so to believe; I will so believe. It can not be an evolution from ape, monkey, hog or barbarian. It has not on it the stench of a beast; but, in its high and lofty conception of the true and the right, it has the sweet aroma of Christian inspiration. Mr. Justice Blackstone was right when he declared that Christianity was in part a parcel of the Common or People's Law.

JAMES S. BARTON.

McMINNVILLE, TENN.

LAW PROGRESS AND LAW STUDY.<sup>1</sup>

In the last issue of your valuable magazine appears a spirited article on "The Progress of Law," in which its author indulges in unmeasured condemnation of those law schools which insist upon careful instruction in the common law in their curriculum. The author evidently regards the time spent in such study as wasted, and seems to fancy that some modern law schools which bestow but little if any attention to the common law, have discovered some royal road to legal lore, that will enable the student who traverses it to discover "the law and the practice of law *as it exists to-day*" in his own State. In the article, the writer quotes from some "eminent lawyer" with whose pages I am not familiar, who appears to share the author's regret that "our fathers were not more wise." Singularly enough both the writer and the lawyer from whom he quotes have fallen into the misconception that the sources of the common law are to be found amid "the customs of our barbarous and semi-barbarous ancestors, added to by the decisions of judges of more recent centuries, most of whom were neither wise nor learned beyond their age."

The eminent lawyer seems to be more rhetorical than accurate when, in speaking of the common law, he says: "In short we find a jumble of rude undigested usages and maxims of successive hordes of semi-savages, who from time to time invaded and prostrated each other; the first of whom were pagans and knew nothing of divine laws; the last of whom came upon English soil when long tyranny and cruel savages had destroyed every vestige of ancient science, and when the Pandects from whence the truest light had been shed on English law lay buried in the earth." Now, the fact is that Christianity existed in England from, about A. D. 61, until the Romans left, about A. D.

<sup>1</sup> Another reply to the article in our last number entitled "The Progress of the Law," by Mr. Justice Walter

Clark, of the Supreme Court of North Carolina: 31 Am. Law. Rev. 410.



403. It is probable that St. Paul himself visited Britain and there planted the Cross. Certain it is that British Bishops participated in person at early councils of the Church, and that her Church dignitaries were at the council of Arles and were invited to the Council of Nicea in A. D. 325. Nor is it at all probable that, after the departure of the Romans, the incursions of Norse and Saxon invaders removed every vestige of ancient science. On the contrary, every student of the history intervening between the subjugation of England by the Romans and its conquest by the Duke of Normandy in A. D. 1066, will find that Christianity existed in the land, side by side with much that was pagan, sometimes in a flourishing, at other times in a depressed condition, as peace or war prevailed. Not only was the Cross firmly planted there, but the civil laws and institutions of the Roman Empire had taken deep root. These laws were found existing in full force when the outside barbarian first began to ravage the land. Under the system in force, the separation of the function of judge and jury was complete. The Praetor or Judex dealt with and laid down the law of the case according to the Roman rule of conduct, and under his rescript, the *Judices facti*, usually consisting of three, heard the evidence produced by the parties to the contention, and, applying to the facts the law laid down by the Judex, rendered their decision. Brought face to face with so enlightened a system of jurisprudence, it is more than probable that men, savage it may be, but yet men of natural strength of mind and of acute reasoning powers, would soon perceive the advantages of such a system over their own, and from time to time would adapt and adopt it, with what was best in their own crude methods of justice. Undoubtedly this would, whilst corrupting the better Roman law, greatly improve their own. Not only did the Pandects shed light on English law, but they were the law itself until it was corrupted as shown above. It is very misleading to say that the last pagans came upon English soil when long tyranny had destroyed every vestige of ancient science, and equally so to say that they came when the pandects lay buried in the earth. When the last pagans came, copies of a large part of the Corpus Juris Civilis — the Pandects and Digest, Code and Novellæ, existed and were in use by the

churchmen of the day ; this vestige of ancient science remained and was neither buried there nor at Amalfi ; and various traces of masonry and of architecture remain to this day, of date anterior to the coming of the last pagans, to show that the science of architecture was not destroyed. In the *AMERICAN LAW REVIEW* for January and February is a learned and able article entitled " Bracton : A Study in Historical Jurisprudence." Such an article will never be written by any one whose legal aspirations extend no higher than to know " the practice of the law as it exists to-day " in his own State. In this article, the author points out that Bracton was quite familiar with the *Corpus Juris Civilis*, the *Decretum* and *Decretals*, as well as the *Digest*, *Code* and *Novellæ*. Bracton, he shows, uses the maxims of Roman law as though they had been fully naturalized. Maxims which are often applied to-day as the very turning-points of the controversy : " *Pater est quem nuptiæ demonstrant* ; *Melior est conditio possidentis* ; *Scientia et volenti non fit injuria* ; *Expressa nocent, non, Expressa non nocent* ; *Cessante causâ, cessat effectus*. If Bracton could write as he did in A. D. 1245, if he had at his command citations from the ancient sources of the law but which he introduces as recognized English law ; if as we now know the *Pandects* were then lying buried at Amalfi ; it is evident that the spirit of the ancient Roman law animated what was at his day the law of England, and that the latter had much of the bone of the bone and flesh of the flesh of its Roman progenitor. Anterior to the Norman conquest all the titles to the soil in England were allodial, a Saxon term meaning without vassalage, but indicating the continuance by the Saxons of the same titles to land as that which obtained under the Roman occupancy. Not until the introduction of the feudal law, with all its oppressive incidents, can it with truth be said that the law of England was inconsistent with the spirit of a free people. Even under the feudal system the spirit of the Twelve Tables is manifest in the very terms of *Magna Charta*. On the continent, the feudal system had almost extinguished the light of the Roman law. There it struggled feebly in the monastery and the cloister, but in England it always burned, thanks to her insular condition and freedom from feudality, dimly perhaps at times, but yet burned,

keeping alive the embers of hopeful reform and lighting the way to justice with its teachings and maxims. The name of the Roman law may very easily have been lost amid the cataclysms of the times, but its spirit survived them, animating the common law, inspiring it with vigor, ever questioning the edicts and constitutions of kings and prelates, restraining the literal word to the true meaning of statutes, and giving shape and form to that which was crude or uncertain, by speaking through wise and liberty-loving judges, on whom its tongues of fire had descended. To rail then at the common law, because at some periods it was incumbered by conditions which shock our present notions of right, is neither temperate nor instructive. To denounce it as a system of barbarian usages, evinces either deficient learning or an iconoclastic spirit that would destroy the most sacred relics of the past ages and substitute in their place the crude notions of reform entertained by a certain class which seems to think ancient history began in the year 1492, and law, liberty and knowledge in 1776. But to observe and admire that genius of the common law which, struggling to break the bonds woven by despotic power around it, at last frees itself, and then addresses its powers to ameliorate the conditions surrounding its new-found freedom, is both deeply instructing and entertaining. In nothing is greater conservatism required than in the law. Changes must and ever will be required as civilization advances and the conditions of life become more and more complex. Let it be remembered, however, that all change is not progress. It is of the very essence of the common law to adapt itself to new and changing conditions. Railroad traffic, the telegraph, photography, electricity, etc.,—all were unknown forces when Edward I., the English Justinian, lived; and yet the principles of the common law existing in his age, are so flexible as to furnish to-day the *rationes dicendi* in cases where matters concerning any of these forces come in controversy. Indeed, most of the statutes relating to such subjects are either declaratory of the common law, or contain some express modification of it. I am somewhat at a loss to know why the writer of the article on which I am commenting, should say: "It was said that old Judge Cowen of the New York

Supreme Court died in the belief that we had 'not yet sounded the depths of trespass on the case;' and the great Judge Story was possessed of the belief that Equity could reform a policy of Insurance." An examination of the arguments and decision in the celebrated "Squib case" will show that all the law is not sounded by saying that in trespass *vi et armis* the damages are direct and in case consequential; and for one I admire the humility and conservatism of a great judge, who did not think he knew it all. As to the remark made about Judge Story's belief, which seems to excite the astonishment of the writer as much as Judge Cowen's doubt does his mirth, it can be said that Judge Story's belief is to-day settled law; for not only will a suit lie to reform a policy of insurance before loss, but even after loss, and to enforce it as reformed, when, through mutual mistake of parties, the written contract does not truly express the agreement. But to return. After quoting from the eminent lawyer who speaks of the common law as a "barren source of pedantry and quibble," the writer goes on to characterize the distinctions taken in the past between Law and Equity, by eminent lawyers, as "absurd and illogical." To me the distinction is not only logical, but inevitable. If the Law is a system of rules of conduct of *generally* binding force, these rules must inevitably, by strict adhesion to them, work injustice in some particular cases, though generally promotive of right. But Equity which looks more to substances than to form, will permit no wrong to exist without furnishing a remedy; and when the remedy at law is inadequate or not speedy or plain, Equity will correct the law in that "wherein by reason of its universality it is deficient." It may be true as the writer asserts that the same court or judge may administer both Law and Equity. It may also be true that but one *form* of action or suit may be allowed — that the plaintiff shall state his case, and the defendant his answer to it in plain ordinary language; but it is idle to say that the statute which allows this has abolished the distinctions of Law and Equity. It has merely abolished certain forms of pleading, clothed a common law judge with the powers of a chancellor, and made his court either a Court of Law or a Court of Chancery to fit the case as made by the pleading, and so

to administer adequate justice. But in stating the case in pleading, the solicitor, if, for instance, the suit be for an injunction to restrain a threatened injury—*quia timet*—must see that pleading has for its major premise the rule of equity supposed and understood, which allows redress in such cases, and that the facts be stated which bring the party pleading within the rule. Again this writer says: “The substance of the law, no less than the forms of its administration, has been from time to time so modified and modernized by statute that there abides the faintest perceptible relic of the old English Common Law.” Can any lawyer accept this statement as correct, when any volume of modern reports will furnish instances of the application of common law principles and maxims to the determination of the meaning, purposes and scope of the statute? Will not the question ever arise in the lawyer’s mind, how far has the common law been changed or modified by the particular statute? And how can any one judge intelligently of such change or modification unless he is familiar with that law, which the statute changes or modifies? Attention is called to the fact that in England to-day a demurrer is unknown, because every defense is now taken there by answer. Well, what of it? Inasmuch as the office of a demurrer, *eo nomine*, is to raise an issue of law for determination by the court, does it make any substantial difference whether such issue is raised by what is termed an answer or by what is called a demurrer? The whole matter is a mere affair of nomenclature. If, under the English practice, a complaint were filed which, on its face, stated facts showing the plaintiff had no right of recovery, or, that omitted to state some essential fact necessary to a recovery, would not an answer pointing out the defect be in fact a demurrer, and would not the court try and determine the issue of law thus raised? The writer says, in effect, that unprogressive law schools waste the time of their students in teaching them an “absurd farrago” of the century old law of a foreign country, but impart no learning of what a young lawyer must needs know—“the law and the practice of the law as it exists to-day in the student’s own State.” But the statement is not verified by the experience or ob-

servation of myself, or others with whom I have conversed. We imagine the statement, judging from the general tenor of the article in which it occurs, is prompted by the iconoclastic bias of the writer, rather than by the desire of fairness.

It is believed all *intelligent* professors of law will deem it absolutely necessary to thoroughly ground their pupils in the learning, the principles, the history, and the more important matters of practice of the common law, as well as in the logical methods of pleading under it; that, whilst doing so, they will be careful to point out the effect of all important statutory changes; that they will indicate to their pupils how, from time to time, as conditions changed, the law itself changed, and that decisions based upon existing reasons ceased to be authority when the reasons changed; that they will be careful to show to minds developing in knowledge of jurisprudence that the common law is a vast arsenal of legal weapons, from which the lawyer well-trained to a knowledge of their cases, may select some one well adapted to disarm and defeat the mere code practitioner whose imperfect knowledge frequently causes him to cite decisions to support his contention which, when read by his antagonist in the light of the common law, are made to destroy the case they were cited to support. Happily this system of instruction has not yet been abandoned in the law schools, nor will it ever be in those which aim to turn out lawyers and not "shysters" as their graduates. In no school worthy of being named as a law school can "a modern and practical education" be "vouchsafed to the young student unless the above indicated lines of study are followed. In this manner only, will the young lawyer ever acquire or know the law and the practice of the law as it exists to-day in the student's own State."

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## THE SUGAR TRUST CASES: A LEGAL COMEDY OF ERRORS.

There were seven cases of criminal prosecutions against contumacious witnesses in the late Sugar-Trust Investigation before a committee of the United States Senate, the final disposition of which cases by the Washington courts is a comedy of errors which would shame the genius of the creator of the two Dromios, and is such a travesty on justice that the blind Goddess must blush for shame to know that it was committed in her name. These seven defendants had been indicted by a grand jury for contempt of the United States Senate in willfully refusing to answer competent and pertinent questions put to them by the committee, touching matters vital to the dignity and integrity of the Senate and vitally affecting the whole fabric of popular government; but the trial court made a farce-comedy of the whole serious proceeding by ordering the acquittal of six of the accused on pretexts savoring of sophistry; made a laughing-stock of the Senate Investigation, and left the Senate impotent to protect or vindicate itself and its members against very damaging public charges.

A brief review of the proceedings which led up to these prosecutions will be necessary to the understanding of the facts and the law upon which the indictments rested, and to appreciate the importance of the success of the prosecutions to the government and to the public interests. The facts are of equal importance with the law, and will be stated as clearly as brevity will allow. The prosecutions grew out of an official investigation ordered by the Senate of the United States into certain grave charges against several senators involving alike their own character and the honor of the Senate. Senators had been publicly charged with bribery and corruption in official acts, and the integrity of the Senate thus assailed; and the investigation was ordered by the Senate in righteous good faith, so that

full proof might be taken in order that the Senate might vindicate its integrity either by proving the charges false, or, being proven true, might purge itself by expelling the guilty members for its own sake and for the sake of the country at large. The matter at issue in the investigation on the part of the United States was none less than that of the power of the Houses of Congress not only to protect themselves and their members from calumny and gross reproach, but to preserve their own integrity by expelling any members against whom personal corruption and public dishonesty might be alleged and proven.

The charges of corruption and bribery grew out of the pendency in the Senate of the Tariff Bill of 1894, which while pending was commonly known as the "Wilson-Gorman Bill." The charges were made by many newspapers and persons, and particularly by the *New York Sun* and the *Philadelphia Press*, that a corrupt bargain existed between certain democratic senators and the Sugar Trust to favor the trust in the sugar schedule of the Tariff Bill by duties to its liking, in return for contributions to the democratic campaign funds; and also that certain senators were corruptly speculating in stocks of the Sugar Trust, and using their official positions to enhance the value of the same.

The Investigation Committee of five senators was accordingly appointed, under resolutions adopted by the Senate on May 17, 1894, promptly organized, and entered upon its duty. Among the witnesses called and examined were these seven, who were subsequently indicted for contempt of the committee and of the Senate in refusing to answer questions put to them. These witnesses were: Havemeyer and Searles, respectively president and secretary of the Sugar Trust; Chapman, a New York stock broker; Shriver and Edwards, newspaper correspondents who had made the charges in the *Sun* and *Press*; and two non-descript witnesses of name Seymour and Macartney. Each of these was sworn and testified up to the point where they refused to answer certain pertinent questions. The nature of the questions proposed and which they refused to answer, may be briefly stated, the substance of the same being gathered from an interesting letter on the subject from the United States Attorney for



the District of Columbia, Hon. Henry E. Davis, to whom the writer is indebted for much valuable assistance for the matter of this article. Havemeyer and Searles were asked if they, as officers of the American Sugar Refining Company, had made money contributions to the political campaign funds in certain States where senators were to be elected in 1894, and if so, what amounts and where expended. They refused to answer, or to produce the books of the trust to show the facts. Chapman was asked whether the firm of Moore & Schley (of which he was a member) had bought or sold what are known as sugar stocks during the months of February, March, April and May, 1894, respectively; or were at that time carrying any such stocks, for or in the interest, direct or indirect, of any United States senator. This he refused to answer. The questions to Macartney were identical with Chapman's, except that they were asked by a single senator, a member of the committee, instead of by the chairman, and he refused to answer. Shriver and Edwards, the newspaper correspondents, were asked the names of the congressmen from whom they claimed to have received the information as to bribery of senators which they had published in their papers. They refused to give the names of their informers. Seymour was asked some questions which he refused to answer, and was indicted, but subsequently answered, and his case was *nolled* with consent of the District Attorney, Mr. Davis, and is thus disposed of. It will be seen from this that all of these questions bore upon the public charges made and were relevant and pertinent thereto; and none of them were pryed into the private affairs of individuals, as was objected to them by the defendants. The refusal to answer these several questions was certified by the committee, in accordance with the Act of 1857, to the Senate. The certificate was signed by the Vice-President of the United States, as President of the Senate, the certificates and the evidence were taken before the grand jury of the District of Columbia, and the seven witnesses were indicted. A demurrer was filed in one case, that of Chapman, was overruled by Mr. Justice Cole, sitting on trial; after much delay and many appeals, the overruling of the demurrer was affirmed, and the case remanded to *nisi prius*, where Chapman

was convicted and sentenced to jail for his contempt and violation of the law. The farce-comedy of the other cases will be noticed in their time.

The indictments and prosecutions were had under the Act of Congress of 1857, a law enacted for the special purpose of strengthening the hands of Congress in making pertinent investigations into public affairs. The statute, as re-enacted in the revision of 1873, is as follows:—

“ SEC. 102. Every person, who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

“ SEC. 103. No witness is privileged to refuse to testify to any fact or to produce any paper respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact, or his production of such paper, may tend to disgrace him, or otherwise render him infamous.

“ SEC. 104. Whenever a witness, summoned as mentioned in section 102, fails to testify, and the facts are reported to either House, the President of the Senate, of the Speaker of the House, as the case may be, shall certify the fact under the Seal of the Senate or the House, to the District Attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.” <sup>1</sup>

While the Chapman case, a sort of test case for the others, was in the limbo of the numerous appeals which the defendant took, in the effort to thwart the righteous judgment of Mr. Justice Cole, the other cases abided its result. But upon the final conviction and sentence of Chapman, the six cases were called for trial. At this point there comes to my table the *Congres-*

<sup>1</sup> Revised Statutes, U. S., Secs. 102-104.

sional Record of July 6th, 1897, and I encounter by chance on page 2750, some directly appropos remarks made by Senator Allen, which I cannot refrain from quoting here. In a running debate on the final passage of the pending Tariff Bill, he touches sharply upon the Sugar Trust, refers to the Senatorial Investigation, and makes some caustic remarks which fit admirably into this discussion right at this point. He speaks of the course of the prosecutions, the efforts of Chapman to escape the toils of Mr. Justice Cole's inexorable sentence, and then with eloquent force: "Finally Chapman went to jail as a consequence of his violation of that law. That was not altogether to the satisfaction of Mr. Havemeyer and his other associates. By some means, unknown to me, Sir, a change of forum took place. Cole and Cox were set aside, and a judge of the name of Bradley appeared on the bench to try the remainder of the indicted persons. They were put upon trial and acquitted as rapidly as the cases were called and the juries could be impaneled. Like Samantha skinning eels, where she kept an eel in the air all the time, Bradley kept one acquittal in the air constantly until all the parties were acquitted." We will now consider Judge Bradley's judicial antics; and, reading this record, we can but wonder, with Shakespeare, wherefore —

\* \* \* "Man, proud man,  
Dressed in a little brief authority,  
Like an angry ape \* \* \*  
Plays such fantastic tricks before high Heav'n,  
As make the angels weep! "

The case of Chapman, which was the only conviction, was not tried before Judge Bradley, but before Judge Cole. His defense, which, as far as it went, was common to all the cases, raised on demurrer several objections, which seem to be — 1st, that the Senate had not the constitutional right to authorize its committee to make the investigations provided for by the resolutions of May 17; 2nd, that the committee had no jurisdiction and authority to require answers to the questions put to the defendant, because the resolution did not avow a purpose on the part of the Senate to take action within its constitutional functions upon such report as the committee might make; 3rd,

that the questions asked of the defendant required of him an exposure of his private affairs, and that he is protected by the constitution of the United States from such inquiry; 4th, that Congress has no power to make the refusal of a witness summoned before a committee to testify, a crime, and therefore the Act of 1857 is invalid; 5th, that the Act of 1857,<sup>1</sup> is a delegation of power to punish for contempts, and therefore invalid. These general objections will be noticed first, as they are fundamental and serious; the objections on which Judge Bradley made his "eel-skinning" dismissals will be seen to be frivolous and a travesty on elementary law.

1. It cannot be denied on principle that the Houses of Congress and similar legislative bodies do have the right to conduct legislative examinations into pertinent matters and to enforce testimony of witnesses. In the constitutional bodies of the United States, this power is not general and unlimited as it may be in the British Parliament. The leading English cases are *Kielley v. Barson*,<sup>2</sup> and *Beaumont v. Barrett*.<sup>3</sup> Under the constitution, the Houses of Congress have respectively the power to judge of the elections, returns, and qualifications of their own members; to determine the rules of their proceedings; punish their members for disorderly behavior; and, with the concurrence of two-thirds, expel a member.<sup>4</sup> They necessarily possess the inherent power of self-protection. In order to carry out any of the powers just enumerated, it would be necessary to discover the facts upon which to base action, and this can only be had by hearing testimony of witnesses. The grant of a power carries with it the right to adopt proper means to attain the end proposed. In the *Chapman* case the Supreme Court settled the matter in these conclusive words: "We quite agree with Chief Justice Alvey delivering the opinion of the Court of Appeals, that 'Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses, and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions;' and that it was to this effect that the Act of 1857 was passed."<sup>5</sup>

<sup>1</sup> R. S. Sec. 102.<sup>3</sup> 1 *Id.* 59.<sup>5</sup> In re *Chapman*, 166 U. S. 661.<sup>2</sup> 4 Moo. P. C. 68.<sup>4</sup> Const. U. S., Art. I., Sec. 5.

2. The questions were objected to on the claim that they intruded into the private affairs of citizens, in violation of the security against unreasonable searches and seizures protected by the Fourth Amendment. The matter under investigation was charges of corruption against senators, not stockbrokers of corporation officials. The questions did not pretend to look into the private business of the witnesses, or the conduct, methods, extent or details of their private affairs. They sought to establish whether certain senators had made corrupt bargains or speculated in certain stocks admittedly and properly traded in by witnesses. The Supreme Court disposes of this objection with good reasoning, saying: "The questions were undoubtedly pertinent to the subject-matter of the inquiry. \* \* \* We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness, simply because he may have been in some degree connected with the alleged transactions; and as investigations of this sort are within the power of either of the two Houses, they cannot be defeated on purely sentimental grounds." The case of *Kilbourn v. Thompson*,<sup>1</sup> much relied on by defendants to defeat the investigation, is entirely distinct from the case at bar. In that case, Jay Cooke was indebted to the government, and failed, and his affairs were in the hands of the courts for settlement. It appeared that he was interested in some real estate pool, and Congress ordered an investigation. A witness refused to give information concerning the affairs of the pool, and the Supreme Court held that he rightly refused, because Congress had no jurisdiction in the premises, for the reason that it could not possibly, as a result of the investigation, take any action one way or another to remedy the situation, and that the courts alone could settle the estate. But in these cases matters concerning the Senate and the public were under investigation, and the Senate had jurisdiction. The right to expel a member extends to all cases where the offense is such as, in the judgment of the Senate, is inconsistent with the trust and duty of a member.<sup>2</sup> Reference to the Chapman case, where reported, will suffice to dispose of the other points raised by demurrer.

<sup>1</sup> 103 U. S. 168.

<sup>2</sup> 1 Story Const., Sec. 838.

In the pending investigation, it was developed that the officers of the Sugar Trust had expended money for the election of Democrats in New York and Republicans in Massachusetts at the same election in the same year. This was not contradicted or denied. So the committee demanded of Mr. Havemeyer, president of the trust, and of Mr. Searles, its secretary and treasurer, the amounts of the contributions and details of its expenditure. With "brutal frankness" they admitted that they had personal knowledge of the transactions; but declined to give the information, on the pretexts that they had not been served with a *subpoena duces tecum*, to produce the trust's books where the evidence would be found; and, too, because the contributions related to local and State elections and not to national elections and because the questions related to their private affairs. And Judge Bradley accepted these excuses and ordered the acquittal of the trust magnates. The pretexts were frivolous. Buying the election of United States senators by corrupting State legislators, is not a local matter; the Senate is the sole judge of the election of its members; and, on proof of illegal or fraudulent election, has the indisputable right to refuse them admission to the Senate, or to expel them if admitted inadvertently. The pretense of not being served with *subpoena duces tecum* is absurd. As pointedly remarked by "Lex," an anonymous writer who reviewed these cases quite ably the other day in the *Washington Times*, "it was not the refusal to bring in the books of the sugar company, or to examine them to refresh his memory, or to ascertain the amount of the contributions, that constituted the offense, but a refusal to answer the questions touching certain political contributions." They had admitted knowing, but refused to tell; therein was their flagrant violation of the statute. But Judge Bradley let them go acquitted on a ridiculous pretense.

The acquittal of Shriver and Edwards, the newspaper correspondents, was on even a more frivolous pretext. They had been called as witnesses, had been sworn, and testified up to the point where they had been asked the names of their informers, which they refused to answer, and were indicted. Judge Bradley held that, inasmuch as they had not been served with a

formal "summons," they could not be convicted. They were both notified by the sergeant-at-arms, whose duty it was to serve summons, that they were wanted, and, asked if they would require formal summons, replied no, but that they would appear. They did appear and testified. The statute expressly provides, that "every person who, having been summoned, or who, having appeared, refuses to answer," shall be guilty, etc. A summons or subpoena in a civil suit, or a *capias* in a criminal case, may be waived by any party, it being but a personal right, and may be waived. A criminal often surrenders himself into the hands of the law; often pleads guilty, and receives his sentence, waiving all the constitutional guaranties of his life and liberty. To hold that a mere witness before an informal investigating committee cannot waive summons by appearance is too ridiculous to deserve the words necessary to formally repudiate it.

On a par with the above case is the holding of Judge Bradley in the case of *Macartney*, who was indicted for the same contempt as *Chapman*, the cases being identical, except that the question was asked during the investigation by a member of the committee other than the chairman. I think that lawyers and laymen alike will agree with the language of Senator Allen in his speech to which I have above referred, where, speaking of Judge Bradley, he says: "I do not know him, and I do not care; but, Mr. President, a man occupying the Bench in the District of Columbia, or elsewhere, who would hold the doctrine that a question put by one member of a committee, when not objected to by the balance of the committee, and when they gave their assent to it by silence, was not a question of the whole committee, ought to be impeached for general incompetency for not knowing a fundamental principle of jurisprudence that has come down to us for six hundred years."

And this general incompetency and ignorance, not to use more invidious terms, extend through the actions of the judge in ordering all these acquittals, making a farce of a momentous proceeding, and bringing into new reproach the administration of the law against the rich and powerful and their protégés.

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## A NEWSPAPER TRUST.

The passing of the news association known as the United Press ends a conflict between two great corporations for the control of the news business of the United States, a conflict which has extended over half a dozen years; and ends it, as all such conflicts end, by the creation of a great monopoly. The struggle between the United Press and its surviving enemy, the Associated Press, the two news associations into which nearly all the daily papers of the country had finally been gathered, was characterized by a keen and relentless competition, the lavish expenditure of money, and, to the eye of an outsider, by intense bitterness of feeling. Each antagonist seemed to draw its inspiration, not from the prospect of advantage to itself, but from the hope of injury to its adversary. The United Press had been obviously tottering to its fall for some time before the final catastrophe; the superior abilities or the superior resources of the Associated Press made daily inroads upon its forces, until hardly a week passed that did not witness the defection of some newspaper from the United Press to its rival. When the collapse came in March, it was merely the fall of a tree already hollowed out to the bark.

By this triumph, the Associated Press acquires a practical monopoly of the business of collecting and disseminating, through its members, the news of the day. Its contracts with them forbid their taking news from or furnishing it to other associations; and, in turn, restrain it from furnishing news to papers not members of the association, or admitting new members in any city without the consent of the local members, except in one contingency, hereafter noticed. The newspapers in this association have, in short, locked themselves in and thrown the key out of the window. We believe, that under certain circumstances, a member may leave the association; but this liberty is something like that of a passenger to leave a vessel in mid-ocean,



by jumping overboard. It is impossible for the private enterprise of a single newspaper proprietor, even of half a dozen such proprietors, to duplicate the vast machinery for the collection and distribution of news enjoyed by an association of this kind; which has a member wherever a daily paper is published and a correspondent at every cross-roads. It is moreover quite unlikely that, so long as the tragic end of the United Press remains in the memory of newspaper publishers, any effective effort will be made to build up a rival news association; and the prospect is that the Associated Press will for many years absolutely control the collection of the telegraphic news of the country, except in so far as its labors are supplemented — and only supplemented — by the special correspondent; and those publishers who are fortunate enough to own a franchise will doubtless reap a handsome return from this monopoly, — a monopoly the most complete and unassailable in existence.

That such would be the outcome of the struggle has long been evident to those who have studied the progress of what may be called the trust-forming habit which is spreading like a ferment through every department of business. The wonder is not that this part of the newspaper business has at last fallen into the hands of a trust, but that it had not done so long ago. Indeed, it has been on the verge of that decline all along, ever since telegraphic news became the corner-stone of newspaper success; and preceding press associations have, by agreements and understandings between themselves, succeeded, to a greater or less extent, in maintaining a monopoly of a limited and changeable sort. From the very nature of the business it is destined to be a mononoly, like the railroad, the telegraph, the telephone and many other forms of public service. If such an agency were managed conscientiously and justly for the benefit of the public, no one would dream for an instant of suggesting that a second and competing agency be created. Where there have been competing news associations a perpetual truce or a war of extermination has been inevitable; and a close monopoly is the certain result of either policy.

So far as we know, not a single voice has been lifted by the newspaper press, ever so loud in its condemnation of trusts and

monopolies, against the introduction of the methods of the financial pirate into a field infinitely more important than hardware and groceries. The steel pool and the sugar trust merely rob us of a portion of our incomes; but it is scarcely an exaggeration to say that the newspaper trust may some day rob us of our liberties. A monopoly of the news may come to mean, not in a legal sense, but practically, an invasion of the liberty of the press. In a city of 600,000 people there are but three daily papers published in English belonging to this monopoly. When the Associated Press succeeds in accomplishing that to which it obviously tends—the destruction of all competing daily newspapers—is it not conceivable that the public may at any time not only find itself without an organ for the expression of its opinions and the maintenance of its rights, but even be denied a hearing in the columns of the daily press? We need not suggest what odious arguments may be resorted to in a time of political strife, to bring about such a conspiracy of silence and suppression; a conspiracy which, in a close contest, might give a fatal and most unfair advantage to the party producing it. Indeed, it is not necessary to assert the bribery of editorial opinion to reach this result. A press association which holds, so to speak, the keys of the newspaper heaven and hell, might find a hint to the publisher sufficient to produce any desired change in the tone of the paper. It is well to remember that the press associations have been accused, time and again, of coloring, if not absolutely corrupting, the news; while that form of distorting facts which consists of reporting one event and not reporting another, or slurring it over in a few words, has been too common to excite even criticism. If the things that have been charged against these associations have been done in the green tree, what will be done in the dry? Will the association mend its ways when it is assured that there will be no competitor present to furnish a truthful account of that which it reports untruthfully? No one knows better than the newspapers themselves what results may flow from this most odious form of trust; yet not a single one of its beneficiaries has the honesty to say that its opposition to trusts extends to those in whose spoils it is allowed to share.

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On the other hand, at least two newspapers have had the courage to appeal to the courts to aid them in clinching the rivets of their monopoly on the public. In Minnesota, the *Minneapolis Tribune* sued out a bill in equity against the Associated Press to enjoin the violation of a contract under which it claimed a right to the exclusive publication in the city of Minneapolis of the news furnished by that association.<sup>1</sup> The facts developed by the evidence were as follows:—

The complainant had entered into a contract with the defendant, on March 2d, 1893, for its news service, and thereafter surrendered, in accordance with the terms of that contract, its rights as a member of the United Press. That contract included, among others, the following provisions: 1. That the *Tribune* should have the right and privilege of receiving and printing the news reports of the Associated Press for a term of years. 2. That the rights, duties and obligations of the respective parties, "*except as hereinbefore specifically provided for*," shall be controlled and governed by the by-laws of the Associated Press. 3. That the Associated Press would not furnish any news reports to any newspaper published in the territory surrounding Minneapolis, "*not now entitled to receive the same under the by-laws of*" the Associated Press, without the written consent of the *Tribune*.

The by-laws of the Associated Press provided that no new member should be admitted from any city in which the association already had a member or members without the written consent of all such members; but another article provided that "newspapers which were entitled to a service of news under existing contracts with the Western Associated Press or the United Press on the 15th day of October, 1892, shall not be considered as new members within the meaning of this article."

Prior to the making of the contract in question, the *Tribune* had been receiving news of the United Press and of the Western Associated Press, which was the predecessor of the Associated Press, and, with the consent of the United Press,

<sup>1</sup> *Minnesota Tribune Co. v. Associated Press*, 77 Fed. Rep. 354.

had entered into a contract with the *Minneapolis Times* to supply it with the news of that association for a term of three years from July 1st, 1891. Though this contract was between the *Tribune* and the *Times*, it could not have been made without the consent of the United Press, under the terms of the *Tribune's* contract with that association, and that consent was given at an interview between the managers of the three companies. Besides, an increase of the weekly tolls of the United Press was made, in consideration of the increased service, and a portion of this increased charge was paid by the *Times*, in addition to the stipulated payments of the *Tribune*. The *Times* also went to a considerable expense in fitting up its offices for the reception of the news report of the United Press; so that its relation to the United Press seems to be a contractual relation in every aspect.

On September 27th, 1894, the defendant, the Associated Press, entered into a contract with the company owning the *Times*, by which it agreed to furnish it for a term of years with its news reports. It was the execution of this contract which the *Tribune* sought to have enjoined by the United States District Court for the District of Minnesota. Judge Lochren, in an opinion evidently prepared with great care, dismissed the bill, on the ground that the *Times* came within the exception of a "newspaper entitled to a service of news under existing contracts with the \* \* \* United Press on the 15th day of October, 1892," and therefore the consent of the *Tribune* was not necessary before a contract could be made by the Associated Press with the *Times* for the use of its news report. The decision seems clearly the only one which could have been rendered on the facts. But on what a slight foundation the rights of the parties rest, will be perceived when it is observed that the section of the contract with the *Tribune* which makes the by-laws of the Associated Press govern the rights, duties and obligations of the respective parties thereto, excepts from this rule only that portion of the contract "thereinbefore specifically provided for;" while the section which apparently gives the *Tribune* an exclusive franchise in the city of Minneapolis follows it, so that that section is subject to the by-laws in question; and it has been shown that those

by-laws specially reserved to the Associated Press the right to admit to membership without the consent of the local members all newspapers which were entitled on a certain date to a news service under existing contracts with the United Press, etc. If these sections had been placed in the contract in a different order it is obvious that the *Tribune* would have had an exclusive franchise, unless the contract could have been attacked on the ground of public policy. That the *Tribune* supposed it was securing an exclusive franchise, can hardly be doubted. If the contracts had been submitted to any examination less searching than that of a judicial contest, even a careful lawyer might have come to the same conclusion as the *Tribune*. The mine is so cleverly concealed that it is difficult to believe that it was accidentally laid.

Whether the Associated Press is endeavoring to extend its service generally to newspapers falling within the excepted class, we do not know. It has made contracts of the same kind with the *Omaha World-Herald* and the *Lincoln Journal* and has thereby brought upon itself a suit for an injunction by the *Omaha Bee*,<sup>1</sup> which claims the same right to an exclusive franchise as is set up by the *Minneapolis Tribune*. But a statute of Nebraska compels telegraph companies and news associations to serve all newspapers impartially, and perhaps these contracts were entered into because of this statute. Judge Keysor held that, under this statute, the Associated Press was not only at liberty to furnish its reports to the papers in question, but could be mulcted in damages if it did not do so; but he also held that, in the absence of such a statute, it might do so, on the same reasoning as was advanced by Judge Lochren in the *Minneapolis* case. The opinion further contains intimations that, on general grounds of public policy, news associations should be compelled to serve the public impartially, just as any other corporation engaged in a public employment is compelled to do.

The Nebraska statute classes news associations with telegraph companies, and it is evident that there is a strong analogy between the functions of the two kinds of corporations, though

<sup>1</sup> *Omaha World-Herald*, May 14th, 1897.

one is engaged in transmitting private information from one person to another and the other is engaged in transmitting and making public what may be termed public information. It was long ago held that a telegraph company could not discriminate between different newspapers, but must give the same service to all at equal rates. That the service of the telegraph company is a mechanical one, analogous to that of a common carrier of goods, while the service of a news association is partly of an intellectual character, requiring the exercise of judgment and discretion and personal confidence between the parties,—does not seem to differentiate the two kinds of service sufficiently to take them out of the same class. It is because a telegraph company exercises a public function and the public is obliged to use it, that the State undertakes to regulate it. As civilization grows and invention increases the instruments of communication between man and man, the law takes hold of them, if their use involves the creation of a monopoly or the exercise of a public function, and applies to them the principles of justice which have been evolved with respect to the simpler instruments of earlier times. The law of common carriers furnished all the law that was required in dealing with the new questions introduced by the railroad; though its application to new conditions has added very largely to it. When the telegraph was invented, it seemed to present an entirely new subject to the courts; but it was not long before they found that the principles of the law of common carriers could be partially adapted to this new service. The telephone has likewise been brought within the reach of the law, and telephone companies are no more at liberty to refuse to serve an individual than is a telegraph company or a railroad. The same reasons which have justified the courts and the legislatures in protecting the public from the oppression or the caprice of these companies, seem to justify them in protecting the public from the oppression or caprice of news associations.

Every argument which has been adduced in favor of the right of the state or national government to regulate those business corporations which have succeeded in one way or another in securing the practical monopoly of a particular commodity,

applies with added force to corporations of this kind. The regulation of those corporations, which has been attempted with more or less success by the states and the nation, seems at first a far stretch of the police power. Whatever power they have has been reached, not by the possession of any public franchise or the exercise of any public function, but simply by a series of acts, each lawful enough in itself, but the result of which public opinion has decided to be an injury to the community. But the very first act in the existence of a news association is an unlawful one in itself; the act by which it makes an exclusive contract with a newspaper; for that contract is a contract in restraint of trade and judged by all the rules which the courts have laid down for the determination of the legal or illegal quality of such contracts, it is illegal. With all their insolence and defiance of public opinion, none of our industrial trusts have had the hardihood to restrict their trade to a single dealer in a large city, as the press association does. It has been repeatedly held that agreements entered into by persons engaged in the same trade the effect of which is to deprive the public, even to a slight extent, of the benefits of unrestricted competition, are illegal and void; while here is an agreement which utterly destroys competition in the business of supplying news reports to publishers, and greatly reduces the competition in supplying the news to the public in the form of a printed newspaper.

Not only is the existence of this association in its present form offensive to the general law of the country, but it is obnoxious to the very terms of the Federal Anti-Trust Law? It is now settled that the transmission of telegraphic messages is commerce; and though that term might seem hardly applicable to a message of a social character, it obviously covers news dispatches which are collected, transmitted and published for the purpose of sale. And wherever such news passes from one State to another it becomes interstate commerce; and any contract in restraint of the trade in it is distinctly within the law. Under the law it is not necessary that the restraint be unreasonable; that question has been decided by Congress when it made *any* restraint unlawful, though a minority opinion was mustered

in the *Trans-Missouri* decision to the effect that when Congress said any restraint it meant any unreasonable restraint.<sup>1</sup>

But if an unreasonable restraint of trade is one which produces a serious injury to the public, then the restraint produced by these press association contracts is of the most unreasonable kind. It is not necessary to consider the injury to a large portion of the newspaper press and their employes who are likely to be driven out of business; the conclusive reason why the powers of the law should be invoked to break up this trust is the public reason already alluded to, the dangerous and restrictive influence which it will exercise on the public press. It is, beyond question, for the public good to increase the number of newspapers; to multiply the number of *foci* of intellectual activity and public criticism and afford an outlet to every shade of opinion. Discussion is the safeguard of democratic institutions; and an ironclad publishers' trust may be as fatal to discussion as a censor of the press. In comparison with this danger, the injury to private interests which is threatened, great as it is, sinks into a matter of small importance.

THOMAS W. BROWN.

ST. LOUIS.

<sup>1</sup> 81 Am. Law. Rev. 451.



## NOTES.

**RECENT APPOINTMENTS TO THE FEDERAL BENCH: MORROW AND DEHAVEN.**—The President recently promoted Hon. William W. Morrow, then holding the office of District Judge of the United States for the Northern District of California, to the office of Circuit Judge for the Ninth Federal Circuit, which office was made vacant by the resignation of Judge McKenna, to take a seat in the President's Cabinet. To fill the vacancy caused by the promotion of Judge Morrow, he appointed Hon. John J. DeHaven, formerly a justice of the Supreme Court of California. Both of these appointments have given the highest satisfaction.

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**AMERICAN BAR ASSOCIATION.**—The next meeting of this distinguished and influential body will take place at Cleveland, Ohio, on August 25th, 26th and 27th, 1897.

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**SUPREME COURT OF THE UNITED STATES.**—This tribunal adjourned on the 26th of May, leaving apparently 380 cases on its docket undisposed of, but actually only 359, 21 of the 380 having been argued and submitted. This is a smaller arrears than the records of the court have shown for thirty years.

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**SUPREME COURT OF MISSOURI.**—The judges of this court are deserving the good opinions of the profession by continuing their spring session through the summer, instead of adjourning with the approach of hot weather, according to the settled custom of the court. The docket of the court is about two years in arrears, and the judges seem determined to catch up. At this writing (July 17) they are still in session, though there have been two weeks of intensely hot weather. The bar will not begrudge them a good vacation. It is the only compensation which falls to the lot of an overworked judge.

**EMBRACERY.**—In construing a benevolent statute, inviting citizens to settle on public lands, the words "single man" will embrace an unmarried woman.<sup>1</sup>

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**"THE LAST WORD ON THE SUBJECT.**—The usually accurate correspondent of the *Law Journal* (London) in a letter printed in that journal on May 29th, quotes at length our observations on the decision of the Supreme Court of the United States, involving the question of the legal right of a sailor in the merchant service to desert, calls them "the last word on the subject," and credits them to the *Harvard Law Review*.

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**A SYLLABUS "WITHOUT REASON."**—According to a syllabus in the *Southwestern Reporter*, a verdict of \$400, where defendant, a large woman, without reason, so severely beat plaintiff, a small woman, that she was disabled for three months, was not excessive.<sup>2</sup> We suppose that if the defendant had not been "without reason," the verdict would have been regarded as excessive.

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**WASTE OF PUBLIC TIME.**—A passage of words took place in a recent trial in England between Mr. Justice Hawkins and Mr. Kemp, Q. C. The learned justice reproached the learned barrister with wasting public time, by bringing and prosecuting untenable actions. The retort was sharp and worthy of the independence of the bar of England. The law journals have been discussing it, defending the advocate, and paying left-handed compliments to the judge. The *Law Times* says at the conclusion of an editorial on the incident:—

May we be pardoned if we add that complaints about the waste of public time come with greatest weight from quarters which are above reproach.

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**A GREAT CHANCELLOR WHO "WENT ALL WRONG."**—The *Chicago Law Journal* prints (or reprints) the following anecdote of one who,

<sup>1</sup> *Silore v. Ladd*, 7 Wall. 219; as given in Danforth's U. S. Sup. Ct. Digest, 997.      <sup>2</sup> *Faulkner v. Davis*, 38 S. W. Rep. 1049.

next to Chancellor Kent, is recognized as perhaps the greatest equity judge who ever sat in this country:—

Chancellor Walworth, according to Mr. Clinton, was responsible for the abolition of the Chancery Court in New York State. He interrupted counsel continually, his interruptions often becoming a discursive and aggravating warfare on the pleader. On one occasion a lawyer commenced to argue a case before him. He had hardly begun when the Chancellor interrupted, telling him that he had brought his action "all wrong;" it should have begun in a different way, which he specified. The lawyer replied that he did not feel at liberty to go against all the decisions applicable to the subject. He said he could find no authority in favor of the course which the Chancellor had suggested. The latter, with no little impatience, said: "Then you should have retained counsel who would have advised you to bring the action as I have suggested." The lawyer replied: "Since your honor went on the bench, there has been no counsel at the bar to whom I could have applied who would have given such advice."

**A POLICE COURT PASTORAL: STRIFE OF PRETTY ROSE McCANN AND HER STINGY HOT TAMALES MAN.**—Will our learned readers forgive us for working in this remnant from our dog-days' collection?—

John Hay had called on Rose McCann. John is a hot tamale man, and it was in Tamale Town he plied his business up and down, and it was there the fight began.

Rose is the flower of "Ellum" street. A rarer bud you'll scarcely meet, and John himself is not a jay, despite the fact his name is Hay.

Last night, the current rumors tell, sweet Rose McCann was raisin' ell because her lover John would not give her a nice tamale hot to satisfy her hunger deep and fix her so she'd go to sleep.

When John refused, sweet Rose McCann commenced to pound her little man, and cried:—

"I'll beat a bale of Hay out of your carcass every day. Unless you treat me like I'm white, I'll cut your gizzard out to-night!"

Just at that moment Sergt. Grass, who heard the noise that came to pass, appeared in all his fighting clothes and there arrested John and Rose.

This morn when John was on the stand Attorney Clover took a hand.

"This is a most unusual day," he said in manner droll and gay. "Here's Rose and Grass and Clover Hay."

"Then Judge Pea-body rose to say: 'I'll fine you both and grant a stay, but let this vegetation cease thereafter to disturb the peace.'—*St. Louis Post Dispatch.*

**COURAGEOUS WORDS FROM A FEDERAL JUDGE.**—In his address to the graduating class of the law school of the University of Colorado, at Boulder, Colo., on May 31st, Mr. United States Judge Hallett, the

Dean of the Faculty, used the following bold words: "Much discussion has arisen of late as to the lawyer's character as a reformer; possibly because the era of reform is upon us, and this is a time of great expectancy in governmental affairs. That he is largely concerned in organizing governments and in making the laws is generally conceded; that he is also conservative of the present order and too much occupied in defense of his learning to accept readily the new ideas of the time is generally believed. In this impetuous age the world has little time to read Bacon's philosophy or to consider his sound common sense.

"It were good that men in their innovations would follow the example of time itself, which indeed innovateth greatly, but quietly.'

"It is a little more than a century since our government was established, according to Mr. Gladstone, 'the most wonderful work ever struck off at a given time by the brain and purpose of man.'

"The changes wrought in that time have been great; some of them must needs be undone. That strange heresy of a divided court that the constitution of the country exempts one-half its wealth from contributing to the support of the general government, may be corrected in the course of the incoming century. So also the private corporation, which is now largely a disguise of the evil machinations of men, may be taken from the body politic, as an unwelcome tumor is sometimes cut from the natural body when it becomes a source of danger. The public temper forbodes many changes in civil life which we cannot here enumerate, but it is clear enough that the incoming century will not be less prolific of change in methods of government than that which is now drawing to a close." We say bold words, from the fact that most of the Federal judges seem to regard it as their peculiar office to protect the poor corporations from the persecutions of socialists, communists and other evil-disposed persons.

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IN WHAT DISTRICT PATENT CASES MAY BE BROUGHT — ALL DOUBT ON THIS SUBJECT REMOVED BY AN ACT OF CONGRESS. — In a note in the preceding number of the REVIEW,<sup>1</sup> we stated that the bill, providing the district where patent cases for infringement should be brought, had passed both Houses of Congress, but had failed to become a law owing to the lateness at which it was sent to the President for his approval. In this last particular, we find that we were mistaken. The bill was signed

<sup>1</sup> May-June, 1897, Vol. 81, p. 438.

in time to become a law, having been the last signed by ex-President Cleveland save two. The Act of March 8d, 1897, to be found in the pamphlet edition of the Statutes of the United States, passed at the second session of the Fifty-fourth Congress,<sup>1</sup> reads as follows: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in suits brought for the infringement of letters patent the Circuit Courts of the United States shall have jurisdiction in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena, upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought." The advantages and benefits to be derived from this Act, in bringing suits for infringements of letters-patent, are explained in the note in the previous number heretofore referred to. The same Congress also made considerable changes in several of the sections in the Revised Statutes relating to patents, which, however, do not take effect until January 1, 1898. This Act may be found in the pamphlet edition containing the statute of the United States, passed at the second session of the Fifty-fourth Congress.<sup>2</sup>

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**CRIMINAL PROCEDURE: GRANTING A NEW TRIAL BECAUSE OF THE INCOMPETENCY OF DEFENDANT'S COUNSEL.**—We recall but one criminal case where a new trial was granted because of the ignorance and incompetency of the counsel for the defense.<sup>3</sup> The alleged counsel for the defense in that case, which was a conviction of murder, was an old negro who had become an applicant for admission to the bar and had been rejected by the judges of the St. Louis Court of Appeals, and had then sneaked out into a country circuit and induced an easy-going and complaisant judge to admit him to practice. Having done that, he came back and attempted to enter upon the practice of law in St. Louis. He was assigned in the criminal court of that city, to defend another negro on a charge of murder. His defense exhibited a degree of ignorance, incompetence and general imbecility such as

<sup>1</sup> Page 695.

<sup>2</sup> Page 692.

<sup>3</sup> State v. Jones, 12 Mo. App. 93.

beggars description. The St. Louis Court of Appeals reversed the conviction on the sole ground that the prisoner had not had the benefit of counsel. No just-minded person could read that record without concurring in the result. The same course has recently been taken in the criminal court of Cook County, Illinois. A defendant in an indictment for perjury, having been found guilty, was granted a new trial by the judge on account of the inefficiency of the counsel who had defended him. The *Chicago Law Journal*, while conceding that the judge may, as the St. Louis Court of Appeals did, have done violence to a technical rule of procedure, nevertheless commended the decision as tending to compass the ends of justice, the purpose for which courts are established and maintained.

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CORPORATIONS: ULTRA VIRES—NATIONAL BANK PURCHASING STOCK AND AFTERWARDS ORGANIZING A CORPORATION TO DISPOSE OF IT — “A VULGAR TYPE OF DISHONESTY.”—The following note of a Federal case is copied by us from the *National Corporation Reporter*:—

Judge Caldwell, of the Eighth Circuit of Appeals, does not mince his words when he hammers a fraud. In *American Nat. Bank v. Nat. Wall-Paper Co.*,<sup>1</sup> a national bank purchased the stock of a dealer in wall-paper at an execution sale in its favor, and afterwards organized a corporation to dispose of the stock. The corporation was managed by the bank's officers and controlled by it. In order to dispose of the stock with advantage, new stock was purchased on credit, and the bank, through its cashier, informed the seller, upon inquiry, of the relation between the bank and the corporation, and that the bank would see that the bills were paid, if the goods were sold.

The bank pleaded *ultra vires*, but the court held that by necessary implication the bank could, to save a pre-existing debt, buy fresh goods to mingle with the purchased goods, in order to sell it to advantage.

The bank also tried to escape the debt by claiming that the cashier had no authority to buy the goods in question. Upon this subject Judge Caldwell spoke the following trenchant words:—

“It is commonly supposed that banks and bank cashiers represent the highest type of business honor and integrity, and generally this high opinion is fully justified; but the correspondence between the plaintiff and this bank through its cashier reveals on the part of the bank and its cashier that vulgar type of dishonesty of obtaining goods on credit, and then refusing to pay for them, and a court of justice is deliberately asked to put its seal of approbation on this method of doing business. It is said the court should do this for the protection of the bank's stockholders, but we know of no principle of law or morals that would justify the court in holding that a bank can obtain the property of the citizen by promising to pay for it, and, after obtaining it, convert it into money,

<sup>1</sup> 77 Fed. 85.

and put the money in its vault, and then refuse to pay for the property upon the ground that such action would be prejudicial to its stockholders, or that it had no legal right to purchase the property. If it had no right to purchase the property, it should return it or its proceeds. The stockholders of the bank have no legal or moral right to profit by such illegal or dishonest acts of the bank at the expense of the innocent merchant whose property it has appropriated."

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**QUALIFIED PRIVILEGE.**—Mr. Blake Odgers, Q. C., in his fifth lecture on The Law of Libel, under the new scheme of the Council of Legal Education, delivered at the Middle Temple Hall, dealt with "Qualified Privilege." Every fair and accurate report of any proceeding in a court of law was privileged, unless the court has itself prohibited the publication, or the subject-matter of the trial was unfit for publication. That was so even where an application was made to the court *ex parte*. All comment must be reserved till the trial was over. Similarly, a fair and accurate report of any proceeding in either House of Parliament was privileged although it contained matter defamatory of an individual. At one time, only proceedings of a public meeting were privileged at common law. The lecturer referred to the decision of the Court of Appeal in *Purcell v. Souler*, and the Newspaper Libel and Registration Act. The Law of Libel Amendment Act, 1888, defined "public meeting" to mean any meeting *bonâ fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted. The next question discussed was malice. Dr. Blake Odgers said that, as soon as the judge ruled that the occasion was privileged, the plaintiff had to prove malice. Malice did not mean malice in law, a term in pleading, but actual malice, a wrong feeling in a man's mind. It might be proved by extrinsic evidence, showing that there were former disputes or ill-feeling between the parties, or other libels or slanders published by the defendant or the plaintiff. Or it might be proved by intrinsic evidence, such as the unwarranted violence of defendant's language, or the unnecessary extent given to the publication.—*Montreal Legal News*.

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**OUGHT THE PROFESSION TO BE ASKED TO SPARE THE COURT FUTILE LITIGATION?**—Mr. Justice Kekewich appears to think so. In proceedings against the Cheque Bank Limited he said: "Therefore, treating this case as a case of substance, I have no difficulty at all in coming to the conclusion that this balance-sheet is honest and correct, and that

the dividend which is proposed to be paid has been properly earned, and may properly be paid." Then his Lordship proceeded:—

But, unfortunately, there is another aspect to the case. The Cheque Bank have no right to complain; but I think the court, as representing the public, has a very large right to complain. No time is wasted in deciding points of law between suitors; no time is wasted in threshing out the facts which are necessary for the decision of points of law; but time is more than wasted—it is squandered—when it is taken up by bringing forward speculative cases like this for some motive, which I do not pretend to discern, with a view to bring aspersions against some persons or companies, and when it is supported by such attempts at evidence as we have heard here to-day. That I think one has a right to complain of. I am always vexed, and I am extremely vexed to-day, that the legal profession should have been induced to be brought into such a case as this. Counsel must do their duty, I know, and make the best of the materials they have; and, unfortunately, if they have no good materials, they are sometimes obliged to make the best they can of bad. But all this fringe—less than fringe—outside ornament—about Mr. Hartmont, and Messrs. Armstrong and Co., and many other things—what they have to do with the case I do not know, the only case really worth raising in a court of law being the one which I have mentioned, and have disposed of on a substantial ground. Unfortunately, a great deal of time has been wasted, and the case is one which does not do very much credit to a court of justice—at any rate, very little indeed to the plaintiff, or those who support him. I think counsel have done their duty, and but for that, perhaps, we should have been here for another day or two.

The learned judge seems to draw a distinction between counsel and the legal profession, by which we presume he means solicitors. Solicitors must act for clients; counsel must act on the instructions of solicitors. Neither is to say they will not act because the evidence is insufficient. They advise it is so—the client determines to proceed. What would Mr. Justice Kekewich have either branch of the profession do?—*Law Times* (London).

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**ACTION AGAINST THIRD PERSON FOR PREVENTING THE ENFORCEMENT OF JUDGMENTS OR LIENS.**—We take the following from the April number of the *Harvard Law Review*:—

A recent New York decision seems to show pretty plainly that one should not induce or aid a third party to commit a breach of legal duty to another, unless he wishes to answer the injured party in an action at law. The court decided in this case, *Hoefer v. Hoefer*,<sup>1</sup> that an action similar to an action on the case at common law will lie by a wife in whose favor alimony has been

<sup>1</sup> 42 N. Y. Supp. 1035.



decreed pending divorce proceedings, against one who has induced and aided the husband to leave the State in order to avoid the payment of the alimony. The same result was reached in the old case of *Smith v. Tonstall*,<sup>1</sup> where the plaintiff had obtained a valid judgment against a third party, and the defendant afterwards, to injure the plaintiff, induced the third party to confess a fraudulent judgment, in consequence of which the plaintiff was unable to secure the payment of his claim. *Michalson v. All*,<sup>2</sup> a case recently decided in South Carolina, illustrates the same principle. Here the defendant in collusion with the owner, placed farm products subject to an agricultural lien beyond the reach of the lienor, and it was held that the latter could recover.<sup>3</sup> *Lamb v. Stone*,<sup>4</sup> seems inconsistent with these decisions. This case decided that, where the defendant had fraudulently purchased the property of a debtor and had induced him to leave the State to avoid paying his creditor, an action by the creditor would not lie. *Klous v. Hennessey*<sup>5</sup> similarly gives no relief to the creditor. These decisions, however, are placed upon the ground that, at the time of the defendant's acts, the debtor was as yet under no legal obligation to the creditor by reason of a judgment, lien or similar proceeding, and that therefore the damage to the creditor was too remote and contingent to admit a recovery. While the justice of this position seems doubtful, and while the question as to whether the creditor would have secured a legal right against the debtor might well, it is conceived, have been left to the jury, these cases are clearly distinguishable from *Hoefler v. Hoefler* on the ground, as already indicated, that in the latter the third party was already under a legal duty to the plaintiff, and that the damage, the loss of the alimony, was therefore the direct and natural result of the defendant's acts. Whether or not the defendant in *Hoefler v. Hoefler* might have been held answerable in contempt proceedings, as suggested by the court, there seem to be reason and good sense, as well as authority, in favor of compelling the defendant in such a case to respond in damages to the injured party.

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THE REFORM IN DIGESTING DECISIONS: NOT DIGESTING ANYTHING THAT HAS NOT BEEN OFFICIALLY REPORTED.—The *Albany Law Journal* says:—

It is gratifying to learn that a reform is to be instituted in the matter of digesting reports of the decisions of the courts. Serious complaint has been made by lawyers, as well as by leading papers, of the digesting of decisions as they appear in unofficial reports, and that there are no citations of the official reports, except in those cases where the official volumes come out prior to the time of their going to press with the annuals of these digests. The objections to this practice are so many and obvious that there is no need of enumerating them; and no one will be likely to dispute the proposition that no case ought to be digested in any permanent form until it has been officially reported.

<sup>1</sup> Carthew, 3.

<sup>4</sup> 11 Pick. 527.

<sup>2</sup> 21 S. E. Rep. 323.

<sup>5</sup> 13 R. I. 383.

<sup>3</sup> See also *Adams v. Paige*, 7 Pick. 542.

The *Albany Law Journal* fully agrees with the *AMERICAN LAW REVIEW* when it remarks that "if this policy had been adopted in the first instance by the West Publishing Company and by the Lawyers' Coöperative Publishing Company with regard to the annuals of their respective digests, we should not have been obliged to run the hazard of citing decisions which are no decisions; nor should we have been obliged to resort, in order to search for the official reports, to that abominable expedient of the St. Paul house, known as the "Blue-Label Book." With a view of remedying this unsatisfactory state of things, the Lawyers' Coöperative Publishing Company have determined upon a new departure by which their permanent volumes are to be semi-annuals. The temporary volumes, which are to be designed to keep abreast with the work of the courts, will hereafter be issued in the form of quarterlies, bound in paper covers. A permanent volume will be issued every six months, which will include no case which has not been officially reported. This is certain to prove a very satisfactory scheme, and the example of the Rochester house ought to be followed by the St. Paul publishers without delay.

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**THE IMMUNITY OF CORPORATIONS IN MISSOURI.**—Last winter the Bar Association of St. Louis presented a bill to the legislature of Missouri to restrain corporations from preferring particular creditors in contemplation of insolvency. The bill passed both Houses by overwhelming majorities, but was vetoed by the Governor. The Governor in his veto message said: "The real mischief and rank injustice which the bill, under the guise of fairness, will work in every-day business corporations cannot be fully conceived." It is staggering that any State has a chief magistrate who can write such stuff. It is a view bounded by the horizon of the country banker and note-shaver. It is well-known that all kinds of business in Missouri are conducted by corporate organizations. It is equally well known that when a Missouri corporation fails, the preferences are: First, to the local banker; secondly, to the directors; thirdly, to the relatives of the directors; then to favored creditors in the order of the desire to bestow favors and get something in future. So far as we know, the power of trading companies to prefer particular creditors has never existed in England. It was abolished several years ago in Arkansas, and it does not appear that any "mischief or rank injustice" has been produced by its abolition. The climax has lately been capped by a decision of the Supreme Court of Missouri which squarely upholds the right of an insolvent corporation to prefer its own directors. The directors, having the inside knowledge of when the corporation is going to fail, can thus always secure themselves at the expense of the very men whom they induced to confide in the solvency of their concerns. Such, we are pained to write, is Mis-

souri justice. With such law in force, no Missouri corporation is worthy of any mercantile credit whatever. If we add to this the fact that Missouri has now adopted the "chips and whetstones" doctrine, under which, although the statute requires one-half of the capital of a trading corporation to be paid up in cash, it can be paid up in anything which the promoters may please to call cash, the same being something which the corporation might buy, and at any valuation which they are pleased, in the absence of fraud, to regard as the true valuation. Nothing but express fraud—a positive intent to cheat somebody—will enable shareholders, who, knowing the manner in which the shares have been paid for, have become the purchasers of them, to be assessed for the benefit of the creditors of the corporation. It was so held where, on the same day on which the shares of a corporation had been paid up in property, the shareholder, knowing all the circumstances, turned around and sold them to third parties knowing all the circumstances, at ten cents on the dollar.<sup>1</sup> The law of private corporations, as established by the Supreme Court of Missouri, then is: 1. That a corporation can be organized and "stocked" by turning in personal property at anything which in "good faith" the promoters may choose to regard as worth the shares issued for it. 2. That when the directors find the concern insolvent, they can take care of the local banker and note-shaver and use the very goods shipped to them by their Eastern creditors to do this. 3. They can prefer themselves as creditors, converting the very goods which they have induced the Eastern creditors to ship to them into money for that purpose. Debauchery and rascality could go no further.

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BOOK TARIFFS. — Mr. J. T. Bulmer, of Halifax, N. S., has a communication in the *Evening Mail*, of that city, of May 11th, in which he states, in a summary way, the condition of the world in regard to tariffs upon books. He shows that in 1883, books were free in every country of Europe except Turkey and Spain. Turkey taxed them at the rate of 7.20 per cent *ad valorem*, while Spain showed its appreciation of literature by lumping them together, weighing them, and taxing them at so much per hundredweight. This reminds the writer of the fact that he once paid duty, in an Italian custom house, on French photographs after they had been weighed on an enormous pair of steel-yards. Mr. Bulmer refers to the fact that "the wires are throbbing the news that the amended tariff of the United States declares for free

<sup>1</sup> *Wolfolk v. January*, 131 Mo. 620, 629.

books," and he denounces the policy of Canada of taxing foreign books, charts, maps, scientific instruments, etc., as being "like the fleece of the Hebrew warrior, dry in the midst of benignant and fertilizing dew." He declares that such a policy "puts out the fires of every thought factory in Canada, and so far as it goes, condemns the country to an ignorance as dense as that enveloping the ministers who enacted it, and any member of Parliament who will be found supporting it." He calls it "this senseless tariff flounder." He does not, so far as we see, draw attention to the fact that the real promoters of this species of tariff are the publishers and the printers.

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A LIE WHICH CAUSED A SHOCK WHICH CAUSED AN ILLNESS.—Mr. Justice Wright and a common jury had before them last week the very interesting case of *Thomas and Lavinia Wilkinson v. Downton*. Before the trial began the learned judge looked somewhat contemptuously at the statement of claim, and asked Mr. Warburton (counsel for the plaintiff) whether he had any authority for saying that such an action would lie. The important paragraphs of the statement of claim are worth reproducing exactly as they stood:—

"2. On the 9th of April, 1896, the plaintiff Thomas Andrew Wilkinson went by train to see the Harlow races, and in the evening of the same day, the plaintiff, Thomas Andrew Wilkinson, being then absent, the defendant entered the public-house at 25 St. Paul's road, and then and there falsely, fraudulently, and maliciously told the plaintiff Lavinia Elizabeth Wilkinson that he had received a message from her said husband that the said Thomas Andrew Wilkinson had had a smash-up and was at that time lying at the Elms public-house, Leytonstone, and that the said Thomas Andrew Wilkinson had desired the said defendant to request the plaintiff Lavinia Elizabeth Wilkinson to go down at once with a cab and fetch some pillows to take her husband home. The said defendant further falsely and maliciously said to the plaintiff Lavinia Elizabeth Wilkinson that her said husband had returned from the races with some friends in a wagonette and was seriously injured, all of which statements the said defendant well knew to be false and fraudulent and spoken by him the said defendant with intent maliciously to and well knowing that he would thereby aggrieve, injure and annoy the said plaintiff, Lavinia Elizabeth Wilkinson.

"3. By reason of the said false, fraudulent, and malicious statements of the said defendant, the plaintiff Lavinia Elizabeth Wilkinson

suffered great mental anguish, and was made seriously ill, and her hair was turned white, and her life was for some time in great danger, and the plaintiff Thomas Andrew Wilkinson, by reason of the grievances herein complained of, has suffered distress of mind on account of his said wife's condition, and incurred considerable expense for medical attendance on his said wife, and otherwise in respect of her said illness, and has lost the services of his said wife, and has been otherwise damnified."

The learned judge allowed the plaintiffs to amend their statement of claim by adding a claim which had been added for the expenses directly caused by the false statement — viz., the expenses of the messengers, whom the wife sent to bring the husband back. This damage the learned judge in the early part of the proceedings considered to be the only damage for which the plaintiffs could in any case sustain their claim.

Such was therefore the final form of the statement of claim, which in its original form had caused Mr. Justice Wright to ask whether there was any authority for such an action. Mr. Warburton answered that there was plenty of authority, from *Palsey v. Freeman*<sup>1</sup> downwards. The judge said that he thought that the plaintiffs might recover the damage to which he alluded, and he therefore allowed the counsel for the plaintiffs to open their case.

The case was accordingly opened, and facts sufficient to sustain the allegations which we have cited were proved. Mr. Abinger, for the defendants, ridiculed the story of the hair turning white. Yet that is a recognized phenomenon, the notion of which Lord Byron made familiar in the well-known lines in which he explained that the case of the Prisoner of Chillon was different:—

My hair is grey, but not with years,  
Nor grew it white  
In a single night  
As men's have grown from sudden fears.

Mr. Abinger tried to show that no real deception had been practiced, and that no real shock had been suffered; but that, in the language of his pleading, the words were "spoken humorously and by the way of a joke, and were so understood by the plaintiff." He also suggested that they were not spoken by the defendant at all, but by another man called Boorer, and Boorer corroborated him in this. But the jury believed otherwise. They found that the defendant had spoken the words; that he meant them to be believed and acted on; that they were

<sup>1</sup> 3 Term Rep. 51.

false to his knowledge; that they were believed and acted on; and the medical testimony satisfied them that a serious illness resulted as the effect of what was said. They found that the messenger's expenses were only 1s. 10½d., but they assessed the damages on the score of illness resulting from the shock at £100.

Could this sum be recovered? If I maliciously tell you a lie, which gives you a shock, which causes a serious illness, am I responsible in damages for the effect of my words?

The point is novel, but we think that our readers will incline to the opinion that the answer should be "Yes." And so Mr. Justice Wright decided, in spite of his previous hesitation so to do.

He did not think that *Pasley v. Freeman*<sup>1</sup> and *Langridge v. Levy*<sup>2</sup> carried the plaintiffs very far. In the first of these cases the lie was, "John Christopher Falch is a person safely to be trusted and given credit to," and the injury was that the plaintiff thereby lost certain goods, wares, and merchandises, and the value thereof; and in the second the lie was, "This gun was made by Nock, and is good, safe, and secure," and the injury was the destruction of the plaintiff's son's left hand by its explosion. Only the 1s. 10½d., the expenses of the messengers, could in the present case be recovered upon a principle similar to that of those cases.

The judge thought, however, that the £100 might be recovered upon another ground. "The defendant," said he, "has willfully done an act calculated to cause physical pain to the plaintiff, *i. e.*, to infringe her legal right to personal safety, and has, in fact, thereby caused physical pain to her. This willful *injuria* is in law malicious, although no malicious purpose to cause the harm which was caused, nor any motive of spite, was imputed to the defendant."

Was the damage too remote? The case of the Victorian Railway Commissioners *v. Coultas*<sup>3</sup> was relied upon by the defendant as showing that it was so. In that case the Privy Council, arguing that damages in a case of negligent collision must be the natural and reasonable result of the defendant's act, considered that damages claimed on account of a nervous shock or mental injury caused by fright at an impending collision were too remote. Mr. Justice Wright said that the Court of Appeal had treated this case as "open to question" in the later case of the signalman.<sup>4</sup> But that case was quite different; it was an action of contract, and all that the Master of the Rolls said

<sup>1</sup> 3 Term Rep. 51.

<sup>2</sup> 2 M. & W. 519.

<sup>3</sup> 58 L. T. Rep. 890.

<sup>4</sup> *Pugh v. London, Brighton, and South Coast Railway Company*, 74 L. T. Rep. 724.

about the Privy Council case was: "It is unnecessary to say anything with regard to that case, except that, being simply an action for negligence, it was quite a different kind of case from the present one." In any case no doubts thrown upon the correctness of the decision by the Court of Appeal, nor by the Irish Exchequer Division, who somewhat disapproved of it in the interesting case of *Bell v. The Great Northern Railway Company*<sup>1</sup> nor the dissent of the Supreme Court in New York, nor the condemnation of eminent writers of text-books, could overthrow the authority of the judgment unanimously arrived at by Lords Fitzgerald and Hobhouse, Sir Barnes Peacock, and Sir Richard Couch.

Was, then, the *Victorian Railway Commissioners v. Coultas* distinguishable from the present case? The learned judge thought that it was at any rate "not altogether in point." "For," said he, "there was not in that case any element of willful wrong, nor, perhaps, was the illness so direct and natural a consequence of the defendant's wrong as in this case."

Then there was the case of *Allsop v. Allsop*<sup>2</sup> where the cause of action was, as in this case, "a lie which caused a shock which caused an illness." The lie in that case was, "You, the plaintiff, have committed adultery with me," and the plaintiff "by reason of the committing of the grievances became and was ill and unwell." The court decided in favor of the defendant—a decision afterwards approved by the House of Lords in *Lynch v. Knight*.<sup>3</sup> But there the *rationale* of the decision against the plaintiff depended upon the particular form of action—an action of slander imputing unchastity to a woman, in which action at that date it was necessary to prove special damage.

Mr. Justice Wright, therefore, received no assistance from the authorities, and treated the case as one of first impression. If not overruled, it will be for all time a leading case; and it seems certainly desirable that when A., in the words of the judge, "has willfully done an act calculated to cause physical pain to B., i. e., to infringe her legal right to personal safety and has in fact thereby caused physical pain to her," A. should be responsible in damages.—E. A. J., in the *Law Times* (London).

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MR. CALHOUN AS A LAWYER.—Abbeville County, South Carolina, was the birthplace of Mr. Calhoun. Mr. Webster, in one of his great speeches, refers to this county. At Abbeville, the county-seat,

<sup>1</sup> L. Rep. 26 C. L. Ir. 428.

<sup>2</sup> 2 L. T. Rep. 290.

<sup>3</sup> 9 H. L. Cas. 577.

Mr. Calhoun had a law office and for a short time practiced his profession. The Calhoun family were among the first settlers of this county, and their descendants are still to be found here. Even to-day one of the neighborhoods in the lower section of the county is known as Calhoun's mills. Near these mills the great Carolina statesman was born and had his home, though he afterwards removed to Pendleton in Anderson County now, according to the present division of county lines. And yet it is strange how little can be learned of Mr. Calhoun from our oldest settlers. Were we to discard histories and books of that character, we would be able to obtain but little information concerning him. The writer resides in the city of Abbeville, and he finds our people somewhat at sea as to where Mr. Calhoun's law office stood. Some of the recollections and impressions which have been handed down I will relate. It is said that Mr. Calhoun, while practicing his profession on one occasion, had one of his complaints demurred to. Under the peculiar circumstances of the case he regarded the demurrer as a reflection on himself, and to some of his friends he said that if the demurrer was sustained he would challenge the counsel upon the opposing side. Fortunately the demurrer was overruled. This is said to have been the nearest he ever came to fighting a duel. A distinguished lawyer of the Abbeville bar recounts the following circumstance which he got from the lips of an old man who once lived in the county: At a gathering there were a number of prominent speakers, but none of them seemed to secure the full attention of the audience. When, however, Mr. Calhoun began to speak the crowd gathered around and listened for an hour with the most intense interest. The old man said that he was the most interesting and delightful speaker he ever heard.

While Mr. Calhoun was a profound thinker and extremely logical, it is said that his reading was not very wide in its range or varied in character. I have been told that in his speeches and writings only one classical quotation can be found and that is "*Timeo Danaos et dona ferentes.*"

While he was a member of Congress someone asked him if he read much, and his reply was: "No, I only read the newspapers so as to keep up with the current thought."

Another distinguishing characteristic was this. He thought out and arranged in his mind beforehand his speeches just as he afterwards delivered them even to the very language and forms of expression. When we remember the character of Mr. Calhoun's speeches—their depth and profundity of thought, their clear and logical style, and the beauty and simplicity of language which pervaded them,—and then



when we know also the fact that these speeches were all thought out beforehand even to the very words—written out in the mind, if we may so speak,—then we must be more than ever impressed with the fact that he possessed a mind far out of the common run.

Those who remember to have met him were all impressed with his conversational talent. He was a fine talker and those who heard him were sure to be pleased with him.

He was fond of young people and especially delighted to be in their company. One of our oldest citizens remembers to have met him in this city on one occasion as he was on his way to Washington to attend Congress, and he says that he was very much impressed with Mr. Calhoun's rare conversational powers and his great interest in the young men whom he met.

WALTER L. MILLER.

ABBEVILLE, S. C.

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**THE PRACTICE OF LAW IN NEW YORK CITY.**—The old practice of a young man just admitted of "hanging out his shingle" in New York City has become nothing more than a tradition, according to a writer in the *New York Sun*. In that city more than 99 per cent of the young lawyers do not even take desk room as independent practitioners, but become law clerks. That means working under orders, submitting to the drudgery that the older clerks will not endure and sinking one's identity behind the army of assistants that the members of the firm direct. This, moreover, is not solely the experience of the clerk and the young attorney. There are hundreds of lawyers in that city, men in the prime of life and members of well-established firms, who are never heard of, for the simple reason that their names do not appear in the firm's style, and that business is transacted with the firm or corporation (as it might be called), the individual being of little moment.

The conduct of one of these large offices is similar in a great many respects to the management of a great newspaper office. The office staff is usually divided into two general classes. There is the corps of business clerks having nothing to do whatever with law matters. They attend solely to the commercial requirements of the firm and perform their duties under regulations similar to those of any other business establishment. They are directed in their labors by a chief clerk, who is responsible to the member of the firm who takes supervision of the office assistants.

The corps of law clerks is the one of which the aspiring young attorney becomes a member. They have wholly to do with law matters. These clerks are young men and women who are studying for the bar or

have been admitted. Of the latter class it is true the most are young men, but unfortunately, it is a fact, and one that often demonstrates the fault of the new system, that a lawyer with fair capabilities never rises above the grade of the law clerk. Just how many of these law clerks there are is not a matter of statistics, and it would be very difficult to make anything like a correct estimate. Their number will reach into thousands and the tens of thousands. Add to this number those in Brooklyn, and the total will be increased by some thousands more.

The law clerks are captained by a clerk, who is dignified by the title of managing clerk. In almost all cases he is a lawyer and the senior clerk in the office. In many instances he is in the prime of life. In large offices the managing clerk has usually worked himself up from office boy or student.

So extensive is the tendency toward the consolidation of all of the law business with very large firms, to the exclusion of the small practitioner, that some of these managing clerks have from twenty-five to thirty men working under them.

It used to be the general impression, and the fact as well, that when a lawyer had made his reputation he didn't trifle with very small cases. Under the present system, however, this is all changed. One of these large law corporations never finds the case, with certain limitations, that is too small for its attention. This further complicates the duties of the managing clerk.

The under clerks find out what they have to do from the managing clerk, and this dignitary gives out his orders in much the same way that a city editor does to his staff of reporters. The managing clerk has both his case book and his calendar. In his case book are entered all of the cases as they come into the office, classified as to the course in which they arise, and sometimes by the nature of the action. This classification having been made, the cases are apportioned by classes to the different clerks, who attend usually to those particular cases. After once having been appointed to look after a case, each clerk is expected not only to keep exact minutes of its progress, but to report the same to the managing clerk, who enters the fact upon his records.

The assignment of clerks to the attendance of cases in court or to the other duties in the office are made by the day calendar, and usually on the afternoon preceding the day on which the duty is to be performed. If the task to be imposed be the drawing of pleadings, the assignment is usually made before this, but it is not so necessary that the managing clerk should look after this particular line of work on

the day calendar, for it is very rarely that a clerk having charge of a particular case overlooks so formal a matter as that.

The particularity with which details have to be cared for makes the most rigid system necessary. All of the most interesting parts of the practice are looked after by the junior members of the firm, or by the senior clerks, who are lawyers. The pleasing experiences of fame and fortune that the young man dreams of as a student are not open to him in the stern practical life that he encounters in working for one of these firms. The pay of the clerk ranges all the way from \$3 a week to \$5,000 a year. The man who would command the larger sum must be a well-equipped lawyer. If he had been able to establish himself in business with his ability at the same period in life, he ought to be able to get from his practice three times that sum.

Whatever may be said in favor of the present system, it is certain that it is following the consolidation movement in other lines of business. It is very difficult for a young man, unless he is exceedingly bright, to rise from the rank of the clerk to that of a partner in the firm. Such progress is known and occasionally noted, but it is indeed rare.— *Law Students' Helper* (Detroit).

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**INJUNCTION IN THE FEDERAL COURTS.**— In an article in the May number of the *Yale Law Journal* on the subject of "Injunction in the Federal Courts," Mr. Circuit Judge Woods, of the 7th Federal Circuit, after reviewing the principal Federal decisions in which the writ of injunction has been used in the case of railway strikes, says:—

The officers of the American Railway Union, when arraigned for contempt demanded but were denied a trial by jury, and having been found guilty by the court, after a protracted and formal hearing, were sent to jail, one for six months and the others each for three months; and though such had always been the practice, and from the nature of an equity court there could have been no right to a jury trial, this denial of a demand for such trial was made the excuse or pretense for an attempt, not wholly unsuccessful, to excite public sentiment against the power of the courts, both of law and equity, to punish contempts of their authority, though the power, as every intelligent man must know, is essential to the usefulness of a court, and has been exercised, as occasion required, since the government was founded. As late as April, 1894, a juror in the Federal court at Indianapolis, detected in an effort to be bribed, was summarily declared guilty of contempt of court and sent to State prison for fifteen months; but that incident excited no fear that the constitution was being undermined or the liberties of the people endangered. It is hard to believe that any one in his sober senses thinks the imprisonment of Debs a dangerous precedent; yet at the instigation of Grand Masters and Grand Chiefs of various well-known and reputable organizations, claiming to

represent 800,000 railroad employés, in whose behalf they especially urged that in prosecutions for contempt there should be a right of trial by jury, a number of bills on the subject were introduced in the last Congress, one of which was passed by the Senate embracing that provision, together with others which are not essentially objectionable. It is not unreasonable that in a case of contempt committed out of the presence of the court there should be a formal procedure upon affidavit showing the facts supposed to constitute the contempt, to which the defendant should be allowed to make answer, and that the trial should be upon evidence adduced in open court. If the practice in such cases in any court has ever been essentially different the fact was not disclosed in the Senate debate. The bill undertook to put no limit upon the amount of fine or imprisonment in such cases, but contained a provision for an appeal, which the writer thinks ought to be allowed in cases of all sorts when the matter is of importance and especially when personal liberty is involved. It might well be provided, too, that for a contempt infamous punishment should not be inflicted. Such punishment can be appropriate only to infamous crimes. But the privilege of trial by jury is inconsistent with the purpose of the power to punish in such cases, and could only result in crippling and demoralizing the courts in the daily administration of justice. In a court of law, if a juror or panel of jurors should refuse to attend, it would be necessary that other jurors be summoned to try them for the contempt, and what if they, too, should refuse to come? And what if the marshal and his deputies should refuse to serve the writs of the court? An equity court has no jury, and unless it is to be supplied with a new and incongruous piece of machinery to be kept on hand, or summoned when needed, solely for the trial of contempts as they may occur, will have to send its contempt cases to a court of law, to be tried when in the course of business in that court they shall be reached, suspending meanwhile its own procedure.

It is well to observe, moreover, that if the trial by jury were allowed, a strike like that of 1894 at Chicago would have no better chance of success. Now, that the jurisdiction of the courts in such cases is beyond question, an injunction would certainly issue as before, and if not heeded the President, if true to his trust, would send the army as before to compel submission; and that accomplished it would be a matter of comparatively small importance whether there should be trials for contempt, or whether, if had, they should be by the court or by jury. The question involves no more the rights and liberties of laboring men than that of other citizens. Nobody in his right mind believes that there has been usurpation of power by the courts, or that the power exercised is the source or beginning of peril to individual or collective rights. Out of all that has been done by the courts since the Government was founded there can be deduced no sound reason for depriving them of their accustomed and well-understood power to enforce respect and order in their presence, and to compel obedience to their writs and commands whenever lawfully sent.

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**BAD LEGISLATION AND TOO MUCH OF IT.**—This is getting to be a very common complaint. Not only is the quality of our State and congressional legislation very poor, but there is altogether too much of it.

The *New York Law Journal* advocates the change to biennial sessions. This system has been adopted in Missouri and some other States. It may be doubted whether it is of any benefit. The newer constitutions of several of the States limit sessions of the legislature to a very short period. This would deprive even a competent legislature of adequate time to attend to the business that demands attention at any session. Meantime some smart editor has, with more or less accuracy, hatched the following catalogue of crank legislation enacted or sought to be enacted in various State legislatures:—

The Michigan legislature has under consideration the prohibition of printing hotel *menus* in a language other than English; Indiana, the establishment of "a new mathematical truth," viz., the squaring of the circle; Nebraska, the penalizing of football as a misdemeanor; Missouri, an act to prohibit railroad companies from using wooden rails and tying them with string, and flirtations with or by railroad employés; Kansas, an act to prevent the wearing of corsets or bloomers; Pennsylvania, so we hear, an act to require every man to pay for his own drinks; Minnesota, a bill to require a red light to be displayed on the outside of every drinking saloon, with the word "Danger" thereon; and the Senate of another State not long ago wrestled with the problem whether a druggist selling patent medicines should not keep affixed in a conspicuous place in his store an affidavit stating that he had himself tried one bottle of the mixture in question and experienced no deleterious effects therefrom. At the present moment another learned assembly is gravely debating the question of the statutory enactment of the Ten Commandments, an amendment having been proposed to the tenth, prohibiting the coveting of a neighbor's bicycle; and the high theater hat has been the subject of much anxious legislative thought in half a dozen States.

The following chapter of fool legislation, and attempted fool legislation, has been compiled by the learned and industrious editor of the *Chicago Legal Adviser*:—

After a brief discussion, the Kansas legislature has decided to permit women to wear bloomers and corsets.

A bill has been introduced in the lower house of the Missouri legislature, making it a penalty, punishable by a penitentiary sentence of five years, for a married man to be found guilty of matrimonial infidelity, under any circumstances whatever.

A bill has been introduced, by a populist member of the Kansas senate, which provides for letting out all county offices to the lowest bidder. This ought to be entitled a bill to foster bribery.

A bill prohibiting the wearing of high hats by ladies in public gatherings, where an admission is charged, is likely to pass both houses of the Indiana legislature.

Representative Hood, of the Missouri legislature, has introduced a bill forbidding railway conductors and brakemen from flirting with female passengers. Violations of this law will be punishable by a fine of \$25, payable by the corporation owning the railroad, they being held responsible for its enforcement.

A bill before the legislature of California provides that two fotografs shall be taken at public expense, of every voter registered; one set to be placed in a book in alphabetical order of names, and the other in another book, arranged by streets and numbers of rooms in houses.

A bill has been introduced in the Minnesota legislature which provides that any person who shall give, or offer to give, or send flowers, or any other token of sympathy or admiration to a person under arrest, charged with a crime amounting to a felony, or is under, or awaiting sentence for a crime amounting to a felony, shall, unless such person stands in the relation of husband, wife, child, parent, brother or sister of such criminal accused, or is an ordained minister of the gospel, be guilty of a misdemeanor, and on conviction thereof, be punished by imprisonment in the county jail for a term of not less than fifteen nor more than ninety days.

Among the bills recommended for passage in the Indiana house has been one making it unlawful to play football in that State.

A member of the Pennsylvania legislature has proposed a bill by which the custom of "treating" is to be declared illegal, and a penalty put upon the offender.

The lower house of the Tennessee legislature has passed a bill providing that all contracts hereafter made in that State, which stipulate for payment in gold, shall be void to the extent that they stipulate for such payment, and that all such contracts may be lawfully discharged in any kind of legal tender.

The legislature of Indiana has before it a bill which provides a tax of \$10 per year on every man wearing chin whiskers or "burnsides," and a lighter tax on goatees. Mustaches are exempt.

In the legislature of Kansas, a bill has been introduced and solemnly referred to the committee on judiciary to enact the ten commandments as part of the statutory law of that singular commonwealth.

The Pennsylvania Bar Association have prepared and will advise the passage of a law for the appointment of a commission of experts, whose duty it will be to revise and pronounce upon bills and proposed laws. This commission is to be composed of three members who are to have the qualities of justices of the Supreme Court. All bills are to be referred to it, and its report upon each must contain, first, a concise statement of the existing law, if any, upon the subject, and of the precise nature of the change proposed; second, whether any amendment is needed in substance or in phraseology; third, whether it is consistent with constitutional and statutory requirements. Unquestionably such a commission would arrest a very large portion of the foolish legislation attempted, and, by amending and recasting, would cut off the worst features of much that it could not absolutely prevent. The Pennsylvania remedy seems the most practical and most speedily applied of any that have been proposed for an evil which is exciting a continually swelling chorus of disapproval, and doubtless would prove a satisfactory stop-gap until a radical cure is reached, by making the

position of a State legislator such that a man of standing in the community will be willing to fill it, and by electing none other to it. As this will in most cases require an amendment of the State constitution and perhaps an amendment of the brain and conscience of the voter, it is not a reform which impends in the immediate future. One of the undoubted causes of the deterioration, or at least of the want of improvement, in American legislation is the rise and influence of the party boss. Members of the legislature no longer feel a sense of responsibility to their constituents, but their chief end is to keep in favor with the party boss; and the party boss, in important legislative matters, dictates whether this or that bill shall be passed or defeated, according to his own interests or the temporary interests of his party.

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THE AFFIRMANCE OF THE JUDGMENT IN THE CASE OF DURRANT.—The celebrated murder case of *People v. Durrant*, which was reviewed by Prof. Wigmore in a former number of this publication,<sup>1</sup> passed under review in the Supreme Court of California, and the judgment was affirmed on the 3d of March last.<sup>2</sup> The syllabus contains no less than twenty-seven paragraphs. The most serious question with which the court had to deal evidently was whether, in view of the newspaper clamor which was set up immediately after the homicide, Durrant had a fair trial in San Francisco, or whether there ought not to have been a change of venue to some remote county. The murder was so atrocious and attracted such widespread publicity, accompanied, as it was, with the murder, evidently by the same hand, of another young woman in the same church, that it would have been necessary, in order to have the trial take place in an unprejudiced community, to have taken a change of venue to Persia or China. Certainly the whole State of California was alive with it, and a jury of the first grade of intelligence could not have been obtained within the limits of the State who had not read columns, or even tomes on the subject. After the conviction, the Governor of the State was of course applied to, but he refused to interfere with the course of justice. Then the writ of *habeas corpus* was applied for to Mr. Federal Circuit Judge Gilbert, who denied the application. Then followed a shameful abuse of the Federal statute relating to *habeas corpus*. From this denial of the application an appeal was taken to the Supreme Court of the United States, which has the effect of hanging the case up and preventing the execution of the pris-

<sup>1</sup> 30 Am. Law Rev. 29.

<sup>2</sup> *People v. Durrant*, 48 Pac. Rep. 75.

oner until the court meets in October. The *habeas corpus* act ought to be so amended as to make abuses of this kind impossible. It is satisfactory to know that the decision of the Supreme Court of California was unanimous in this case.

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**PRESIDENTIAL LAWYERS: JUDGE ANDREW JACKSON.**— In an article in the March number of the *Green Bag* under this title, the writer classifies Andrew Jackson as one of the Presidents who were not lawyers. He says: "President Jackson interrupted the legal sequence held by his predecessors." Andrew Jackson was not only a lawyer, but a judge in Tennessee, at an early date. He was for seven years prosecuting attorney (called attorney-general) of the part of North Carolina and subsequent territory which now forms the State of Tennessee; and was for six years a judge of the Superior Court of Tennessee, the highest court of judicature which existed in that State under its first constitution.

In December, 1789, North Carolina ceded to the United States all the land now embraced in Tennessee.<sup>1</sup> The Act, known as chapter 299, laws of 1789, authorized the two senators, or either of them in conjunction with any two representatives of North Carolina, to execute the deed of cession. Subdivision 4 prohibited the emancipation of slaves. Subdivision 8 provided that then existing laws of North Carolina should remain in force, until altered by complete legislative authority of the ceded territory. Subdivision 11 retained all sovereignty and jurisdiction, in the State of North Carolina, until the cession should be accepted by the United States.

April 2, 1790, Benjamin Hawkins and Samuel Johnson, senators from North Carolina, tendered a deed of cession, which was formally accepted, and the deed, which set out the act of North Carolina,<sup>2</sup> is itself out in full, in the act of Congress.<sup>3</sup>

August 25, 1794, the territorial legislature divided the territory into three judicial districts; and provided for a "Superior Court of Law and Equity," composed of three judges, one from each of the districts, namely: Hamilton, Mero, and Washington; this act, which is quite lengthy, seems to have conferred on the court, thus created, the jurisdiction of the "Superior Courts of Common Law," and super-

<sup>1</sup> 2 Taylor & Yancey's Revision, page 599.

<sup>2</sup> 1 U. S. Statutes at Large, page 491.

<sup>3</sup> 2 Taylor & Yancey, *supra*.



added thereto the "Equitable Jurisdiction" of the English Chancery; it also provided a system of inferior courts.<sup>1</sup>

January 31, 1797, Congress erected Tennessee into a judicial district; provided for alternate sessions of the court, at Knoxville and Nashville, respectively, beginning with the latter; the District Judge was allowed a salary of \$800, and was given the same jurisdiction as that previously given to the judge in the District of Kentucky.<sup>2</sup>

February 6, 1796, the first constitution of Tennessee was unanimously adopted in convention at Knoxville, and was signed by Andrew Jackson, as one of the five delegates from Davidson County.<sup>3</sup>

Article V. is devoted to the judicial department: Section 1 provides that the judicial power shall be vested in such superior and inferior courts of law and equity as the legislature shall from time to time direct and establish. Section 2 provides that judges shall be appointed by joint ballot of both Houses, to hold during good behavior; State's Attorneys the same. Section 3, judges of the Superior Court to receive a stated salary, but no fees or perquisites; can hold no other office, either Federal or State. Section 4, there can be no judges of oyer and terminer, and general jail delivery, throughout the State. Section 5 prohibits the trial judge from charging the jury as to matters of fact; but he may state the testimony, and declare the law. Section 6, judges of the Superior Court may grant the writ of certiorari, in all civil cases. Section 7, other judges may award certiorari, as to courts inferior to them, upon cause shown by affidavit. Section 8, all judges are prohibited from acting where there is affinity, consanguinity, etc., except by consent of parties; and in case of affinity, consanguinity, etc., in the Superior Court, the Governor may appoint a special judge, or judges. Section 9, process must run in the name of the State; and indictments must conclude "against the peace and dignity of the State."

Section 10, each court of record appoints its own clerk. Section 11, no citizen can be fined more than \$50, unless the fine is assessed by a jury, at the time of finding the fact. Section 12. Justices of the peace (limiting the number), to be appointed in each county.

March 28, 1796, the first session of the State legislature begun, at Knoxville. Chapter I. is devoted to judges of the Superior Court.

Section 1 is in these words: "There shall be three judges of the Superior courts of law and equity in this State, any one or more of whom are hereby authorized to hold any of said courts. And it shall

<sup>1</sup> Haywood's Revision, page 177.

<sup>2</sup> Haywood, p. 13.

<sup>3</sup> 1 U. S. Statutes at Large, page 496.

be the duty of each and every of said judges to attend each and every term; and in case of failure to attend, without sufficient cause for said failure be shown, it shall be deemed a misdemeanor in office."

SEC. 2. "No person shall be eligible to, or exercise, the office of judge of any of the said courts, who has not been an inhabitant of this State three years immediately preceding the time of his appointment to said office. Provided, nothing in this act contained shall be construed so as to exclude from being eligible to said office any person who was an inhabitant of this State at the time of making the constitution thereof."

SEC. 3. "Each and every of the said judges, before they act as such, shall, in open court, or before the Governor for the time being, take the following oath: 'I, (Andrew Jackson, or as the case may be) do solemnly swear that I will support the constitution of the United States: *So help me God.*'"

"'I, (Andrew Jackson, or as the case may be) do solemnly swear that I will support the constitution of the State of Tennessee: *So help me God.*'"

"'I, (Andrew Jackson, or as the case may be) do solemnly swear that I will well and truly serve the State of Tennessee, in the office of judge of the Superior Court of Law and Equity, of the said State. I will administer equal law and right to all persons, rich and poor, without having regard to any person. I will not, wittingly or willingly, take, by myself, or by any other person, any fee, gift, gratuity or reward, whatsoever, for any matter or thing by me to be done, by virtue of my office, except the salary by law appointed. I will not maintain, by myself, or by any other, privately or openly, any plea or quarrel, depending in any of the said courts. I will not delay any person of common right, by reason of any letter or command from any person or persons in authority, to me directed, or for any other cause whatsoever; and in case any letters or orders come to me contrary to law, I will proceed to enforce the law, such letters or orders notwithstanding."

"'I will not give my voice for the appointment of any person to be clerk of any of the said courts but such of the candidates as appear to me sufficiently qualified for that office; and in all such appointments, I will nominate without reward, the hope of reward, prejudice, favor, or any other sinister motive whatsoever; and, finally, in all things belonging to my office, during my continuance therein, I will faithfully, truly and justly, according to the best of my skill and judgment, do equal and impartial justice: *So help me God.*'"

SEC. 4. "Each judge is to be paid \$83.33 per month, if he attends throughout the entire term; if he attends but part of the term, proportionate reduction is to be made; clerk certifies attendance."

SEC. 5. "Each day during term, clerk must enter on his minutes the names of the judges in attendance; for certifying or entering falsely he incurs a penalty of \$500, and is forever disqualified from holding any office either civil or military. Fifteen juridical days are called a term, unless business is sooner disposed of, in which event the shorter time is called a term."<sup>1</sup>

In June, 1798, Howell Tatum resigned his position as a judge of the "Superior Court of Law and Equity." During the same month and year Andrew Jackson resigned his position as senator from Tennessee. Jackson was at once appointed to succeed Tatum, and served until in June, 1804, when he resigned, to accept the position of major-general of militia. In July, 1804, John Overton was commissioned to succeed Jackson, as a judge of the Superior Court. The judicial work of Andrew Jackson, therefore, covers a period of six years, from June, 1798, to June, 1804, both inclusive. North Carolina cases, from September Term, 1798, at Newbern, to June Term, 1804, at Raleigh, will be found in 2 Haywood's Reports.<sup>2</sup> Tennessee cases, for the same period, so far as reported, are to be found in 1 Overton,<sup>3</sup> also in 2 Overton.<sup>4</sup>

"Overton's Reports," so called, are made up from material gathered by John Overton, as a leader of the bar for some years prior to June, 1804, and as one of the judges after that date. He turned this material over to Thomas Emmerson (who was appointed one of the judges in 1807, but resigned after a few months). This material appears to have been edited by Emmerson, who published volume 1 in 1813, volume 2 in 1818. At the time of publication, of volume 1, Andrew Jackson and nine others, each of whom had served on the bench of the Superior Court, certified: "We, the undersigned, do approve the publication, etc.; believing such a publication will contribute in the highest degree to the peace and happiness of society, by ascertaining legal principles." Unfortunately for the complete success of this investigation, the reports, for that period of six years, are very meager; and all reported opinions are "per curiam." The latest reported case in the decision of which Tatum could have participated (before he was succeeded by Jackson), is *Blakemore v. Chambles*,<sup>5</sup> May Term, 1798. Inasmuch as the act of March 28, 1796,<sup>6</sup> made it the duty of each judge of the

<sup>1</sup> Roulston, page 51.

<sup>2</sup> Pages 64 to 386.

<sup>3</sup> Pages 8 to 17.

<sup>4</sup> Page 1.

<sup>5</sup> 1 Overton, 2.

<sup>6</sup> *Supra*.

Superior Court to attend punctually, and made non-attendance (without valid excuse), a misdemeanor in office, we are bound to presume that Jackson occupied the bench eighteen terms, namely:—

September and November, 1798; May, September and November, 1799, 1800, 1801, 1802, 1803; also May 1804. So far as any published judicial record is extant, the history of that period is as follows:—

September Term, 1798, no cases reported.

November Term, 1798, no cases reported.

May Term, 1799, no cases reported.

September Term, 1799, no cases reported.

November Term, 1799, no cases reported.

May Term, 1800, no cases reported.

September Term, 1800, no cases reported.

November Term, 1800, no cases reported.

May Term, 1801, *Hoggart v. McCrory & Gillaspie*,<sup>1</sup> bill in equity to settle disputed boundaries; issue framed, trial by jury, verdict and judgment thereon.

September Term, 1801, no cases reported.

November Term, 1801, *Green v. Emmerson*,<sup>2</sup> trespass.

Defendant was employed by plaintiff as overseer; during plaintiff's absence from home, one of his slaves was ordered by defendant to catch a horse, belonging to plaintiff, and accompany him, defendant, to the racing ground, and test the animal's speed; the slave did as required by defendant.

The horse flew the track, throwing and killing the slave. Campbell, for defendant, asked a nonsuit, contending that "case," not "trespass," was the proper form of action. Overton, contra.

*Per Curiam*: "Let the evidence go to the jury. The line of distinction between trespass and case, in many instances, is so nice, that it seems difficult to discover it; this appears to be one of that description, but modern authorities seem rather to incline to trespass than case."

September Term, 1801, no cases reported.

November Term, 1801, no cases reported.

May Term, 1802, *Kerr v. Porter*,<sup>3</sup> bill in equity, to set aside a grant of land made by the State of North Carolina to one Ford (under whom defendant claimed), on the ground that Ford's claim had been fraudulently altered, by erasures, etc. The principal question before the court, says the reporter, was, "whether parol testimony could be

<sup>1</sup> 1 Ov. 8.

<sup>2</sup> 1 Ov. 13.

<sup>3</sup> 1 Ov. 15.

admitted to show erasures, or alterations, in the entry book of the surveyor-general."

*Per Curiam*: "The books of entries or records; they must be received in the condition they are found; nor are we permitted to presume that any improper alteration has been made. The evidence cannot be received."

Defendant's counsel then insisted that Ford's title was invalid, because his immediate grantor, one Armstrong, had not rendered the services that would legally entitle him to make an "entry."

*Per Curiam*: "It is not our province to liquidate the accounts between the surveyor and the State of North Carolina, which employed him. We presume, in this respect, it is right, the State having made a grant for the land; nor is it competent for this court to admit proof to the contrary. Bill dismissed without prejudice."

September Term, 1802, no cases reported.

November Term, 1802, *Sweetman's Lessee v. Wilbur & Warmack*,<sup>1</sup> ejectment; judgment by default against casual ejector. Defendants refused to confess lease, entry and ouster. Plaintiff suffered nonsuit.

Overton moved for an attachment, for contempt, for not confessing, etc., according to the settled practice in England.

*Per Curiam*: "No such process appears to have been used in this State. We are unwilling to make a precedent in a case, the effects of which must seriously affect the liberty of the citizen.<sup>2</sup> Let the clerk tax the costs, which the sheriff will present to the defendants, for payment; the sheriff will make return of their refusal to pay, should such be the case."

(By the Reporter): "Sheriff presented bill, payment was refused, and he made return accordingly, to the May Term, 1803; November Term, 1803, the court ordered that unless the defendants paid costs within two months, an execution should issue against them."

May Term, 1803, no cases reported

September Term, 1803, no cases reported.

November Term, 1803, no cases reported.

May Term, 1804, no cases reported.

The next case reported in 1 Overton, subsequent to *Kerr v. Porter*,<sup>3</sup> was September Term, 1804, after Jackson had quitted the bench for the army. 2 Overton contains no cases, other than *Sweetman v. Wilbur*,<sup>4</sup> prior to Overton's incumbency. The foregoing, therefore, embraces all the judicial labor of Jackson, of which we have any published record.

<sup>1</sup> 2 Ov. 1.

<sup>2</sup> 8 T. Bl. 205; 1 Salk. 259.

<sup>3</sup> *Supra*.

<sup>4</sup> *Supra*.

Among the old Carolina statutes applied to Tennessee, which does not appear to have been repealed down to Jackson's time, was this:—

Act of March 17, 1743, required county judges to provide and keep, as the property of the county courts, the following books:—

Cary's Abridgment of Statutes;  
Godolphin's Orphan's Legacy;  
Jacob's Law Dictionary;  
Nelson's Justice;  
Swinburne on Wills;  
Wood's Institutes.

We note this old statute, in passing, not that I suppose it to have any relation to the matter in hand, but merely as a curious piece of early legislation — tending to show what was supposed, at that date, to make up the working "kit" of a judge of a subordinate court of record.<sup>1</sup>

<sup>1</sup> Haywood's Revision, page 58.

## NOTES OF RECENT DECISIONS.

**ACTIONS: MALICIOUSLY PERSUADING A PERSON TO BREAK HIS CONTRACT.**—The Supreme Court of Missouri have added the weight of their opinion, in the case of *Glencoe Sand Co. v. Hudson*,<sup>1</sup> to the proposition that it is not actionable merely to persuade a person to break a contract which he has with the plaintiff. One of the reasons assigned for so holding is that the injured person has an action upon the contract against the party who, in consequence of the persuasion, broke it. But suppose this party is insolvent, what then? It has always been the law that a master has an action for damages against a third person who maliciously enticed away his servant, and no reason is perceived why the rule should not be extended so as to give an action against any one who maliciously induces the obligor in a contract to break his obligation to the plaintiff, at least when the obligor himself is insolvent. Such a conclusion, although it may not satisfy the disposition of judges to neglect justice and refine, satisfies the sense of justice of mankind.

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**IRRIGATION COMPANIES: RECEIVERSHIPS — LABOR AND SUPPLY CLAIMS PREFERRED BY ANALOGY TO RAILWAY COMPANIES.**—In the case of *Atlantic Trust Co. v. Woodbridge Canal &c., Co.*<sup>2</sup> it was held by Mr. Circuit Judge McKenna: The equitable rules giving priority to labor and supply claims arising within a limited time before the appointment of a railroad receiver in foreclosure proceedings are applicable by analogy to irrigation companies, which are also *quasi*-public corporations, subserving great public uses.

Where a receiver is appointed in foreclosure proceedings against an irrigation company, claims for labor performed in the construction of ditches, etc., are not entitled to preference over the mortgage debt. Claims for labor expended in repairs and improvements are entitled to preference only when there has been a diversion of income to payment of interest, or otherwise to the benefit of the security. But debts for

<sup>1</sup> 40 S. W. Rep. 98.<sup>2</sup> 79 Fed. Rep. 39.

labor and supplies necessary to keep the works a going concern will be given a preference, even out of the corpus of the property, though there has been no diversion of income.

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**RAILROAD RECEIVERSHIPS: PREFERRED CLAIMS — RENTALS OF TERMINAL FACILITIES WHERE RECEIVER HAS CONTINUED USE OF FACILITIES.**— A receiver of a railroad having been appointed in a foreclosure suit, with instructions to pay, out of moneys and income in his hands, for supplies and operating expenses, and for expenses of operation during the six months previous to the receivership, another railroad company presented an intervening petition in the suit, setting up a contract with the insolvent railroad company to furnish it with terminal facilities at a stipulated rental, alleging that such facilities had been used up to the appointment of the receiver, and by him after his appointment, and claiming a preference, for the rental due, over the mortgage debt. It was held that, as the intervener, whether entitled to its whole claim or not, was at least entitled to a fair rental for the time during which its terminal facilities were used by the receiver, it was error to sustain a demurrer to the whole petition.<sup>1</sup>

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**RAILWAY RECEIVERSHIPS: RIGHT OF GENERAL JUDGMENT CREDITORS TO PARTICIPATE IN SURPLUS IN HANDS OF RECEIVER.**— General judgment creditors, whether their claims arose out of contract or tort, are as much entitled as the mortgage bondholders to participate in the distribution of surplus income accumulating in the hands of a receiver appointed at the instance of stockholders, before the income has been impounded by the mortgage bondholders; and, if there are equitable considerations giving the bondholders a better right, they must be shown by proper averment.<sup>2</sup>

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**RAILWAY RECEIVERSHIPS: DIVERSION OF INCOME BY LESSEE RAILROAD COMPANY.**— When a contract under which the railroad of the company was controlled by another company bound the controlling company to apply the income first to the payment of operating expenses, it only lies

<sup>1</sup> Savannah &c. R. Co. v. Jacksonville &c. R. Co., 79 Fed. Rep. 35.

<sup>2</sup> Veatch v. American Loan &c. Co., 79 Fed. Rep. 471.



in the mouth of the owner of the road to complain of a breach of that provision; and such a breach does not constitute a diversion of funds that will entitle the plaintiffs in a judgment for death by negligence, against the company owning the road, to a preference out of current income as against mortgagees.<sup>1</sup>

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**RAILWAY RECEIVERSHIPS: PREFERENTIAL CLAIMS — PERSONAL INJURIES — DIVERSION OF INCOME BY RECEIVERSHIP.**— Where a railroad mortgage authorizes an expenditure of the income by the trustee, when he should take possession, to such extent as he deems proper in improvements, and in purchases of rolling stock and other necessary equipment and materials, a court appointing a receiver in foreclosure proceedings may authorize the receiver to make similar expenditures; and, where the plaintiffs in judgments against the company for deaths by negligence are claiming the right to a preference out of current income because of such alleged diversion of income by the receiver, it will be presumed, in the absence of a showing to the contrary, that the expenditures complained of were sanctioned by the court.<sup>2</sup>

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**RAILWAY RECEIVERSHIPS: PREFERENTIAL CLAIMS — JUDGMENTS FOR PERSONAL INJURIES NOT PREFERRED.**— Some disposition is discovered in recent decisions to make judgments for personal injuries, done prior to the taking of possession of a railroad by a receiver in a foreclosure suit, preferential claims, on the same grounds on which supply claims, growing out of ordinary business connections and the like, not going too far back in point of time, are preferred over previously existing mortgages. Several decisions deny this preferential quality to judgments for damages for torts.<sup>3</sup> It will be recalled that Mr. District Judge Hanford took a different view of this question. His judgment has been reversed by the Court of Appeals of the 9th Circuit, in an opinion by Mr. Circuit Judge Gilbert.<sup>4</sup>

<sup>1</sup> *Veatch v. American Loan & Co.*, 79 Fed. Rep. 471.

<sup>2</sup> *Veatch v. American Loan & Co.*, 79 Fed. Rep. 471.

<sup>3</sup> *Trust Co. v. Riley*, 16 C. C. A. 610; 70 Fed. Rep. 82; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 74

Fed. Rep. 481, and *Whiteley v. Trust Co.*, 22 C. C. A. 67; 76 Fed. Rep. 74; *Veatch v. American Loan & Co.*, 79 Fed. Rep. 471.

<sup>4</sup> *Farmers' Loan & Co. v. Northern Pacific R. Co.*, 79 Fed. Rep. 227.

**ATTORNEYS' FEES: PRESERVATION OF FUND — PURCHASER AT FORECLOSURE SALE SUCCESSFULLY RESISTING CONFIRMATION.**— In *Farmers' Loan &c. Co. v. Green*,<sup>1</sup> decided in the Federal Circuit Court of Appeals for the 5th Circuit, it is held that, a purchaser of a railroad at foreclosure sale, who resists the confirmation of the sale, and ultimately procures the setting aside of a decree of confirmation, and a release from his bid, is not entitled to be paid, out of the trust fund, his attorney's fees and expenses incurred in that behalf, but can only receive the ordinary taxable costs; and it is immaterial that the services of his counsel may have incidentally benefited the fund.

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**RAILWAY RECEIVERSHIP: PREFERENTIAL DEBTS— MONEY LOANED TO RAILROAD COMPANY NOT A PREFERENTIAL DEBT.**— There is good ground for the conclusion of the same court in the case of *Morgan's &c. Co. v. Farmers' Loan &c. Co.*,<sup>2</sup> that money loaned to a railroad company on its notes at various times, ranging from about nine months to over four years before the appointment of a receiver, with the purpose and result of keeping its road in safe running order, increasing its property and business, and rendering the same more valuable to the bondholders, and maintaining its credit, is nevertheless not a debt which is entitled to a preference over the mortgage bonds, upon the appointment of a receiver.

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**RAILROAD RECEIVERSHIPS: PREFERENTIAL DEBTS — WHEN PURCHASE OF RAILS NOT PREFERRED BEFORE LIEN OF PRIOR MORTGAGE.**— In the case of *Lackawanna &c. Co. v. Farmers' Loan &c. Co.*, lately decided in the Federal Circuit Court of Appeals for the 5th Circuit,<sup>3</sup> it is held that the purchase by a railroad company, under contracts made from about sixteen months to over two years before the appointment of a receiver, of some 20,000 tons of steel rails, to replace the old and deteriorated rails with which its tracks were laid, to be paid for by its notes, due in six months, renewable for six months longer at the railroad company's option, is not a purchase of supplies in the ordinary operation of the road to keep it a going concern, so as to authorize the court appointing the receiver to give the debt a preference over the mortgage debt. The Court of Appeals which decided this case consisted of three district judges. The opinion of the court is written by

<sup>1</sup> 79 Fed. Rep. 222.<sup>2</sup> 79 Fed. Rep. 202.<sup>3</sup> 79 Fed. Rep. 202.

Mr. District Judge Parlange. It reviews a good many of the decisions upon this subject, but not all of them. It is believed to be unsound. There is one case which has held the debt to partake of a preferential quality, although it is six years old; <sup>1</sup> another gives it that quality where it was nearly five years old.<sup>2</sup> If the reconstructing of a railroad track with steel rails so that it may be operated with safety to the public is not necessary to keep it a going concern, within the well-known rule upon this subject, what is?

**PLEADING: VARIANCE — AVERRING THAT THE PASSENGER WAS PUSHED OUT AND EVIDENCE THAT SHE JUMPED OUT.**— In *Washington &c. R. Co. v. Hickey*,<sup>3</sup> it is held by the Supreme Court of the United States that a declaration having alleged that plaintiff was injured by being pushed from a horse car at a crossing in the commotion caused by an approaching train, proof that she was injured by jumping from the car in a reasonable effort to avoid danger is not a substantial variance.

**BURGLARY: ENTERING THROUGH OPEN DOOR.**— Some of the refinements of criminal law which bring disgrace upon the administration of justice may be illustrated by a decision of the Kentucky Court of Appeals in *Ross v. Com.*,<sup>4</sup> where it is held that although the removal of props from the door of a warehouse, in order to open and enter, may be a breaking of the building, — yet if a door or window be partly open, it is not a breaking to push it further open. If, however, the door is closed at the time of the entry, although not locked, it is a "breaking" to push it open and enter.<sup>5</sup>

**CONSTITUTIONAL LAW: VALIDITY OF STATUTES VESTING THE AVAILS OF LIFE INSURANCE POLICIES IN THE BENEFICIARIES, FREE FROM THE DEBTS OF THE INSURED.**— In the case of *Skinner v. Holt*,<sup>6</sup> the Supreme Court of South Dakota holds two statutes of that State unconstitutional which have the effect of rendering life insurance policies exempt from the claims of the creditors of the insured without regard to their amount, — the ground of the decision being that the two statutes

<sup>1</sup> Union Trust Co. v. Morrison, 125 U. S. 591, 604.

<sup>2</sup> Northern &c. R. Co. v. Lamont, 69 Fed. Rep. 98.

<sup>3</sup> 17 Sup. Ct. Rep. 661.

<sup>4</sup> 40 S. W. Rep. 245.

<sup>5</sup> Martin v. State, 40 S. W. Rep. 370.

<sup>6</sup> 69 N. W. Rep. 595.

in question impair the obligation of contracts, within the meaning of the constitution of the United States and the constitution of South Dakota.

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**FIXTURES: EXPIRATION OF TENANT'S RIGHT OF REMOVAL.**— In the case of *Thomas v. Jennings*,<sup>1</sup> recently decided in the Queen's Bench before Mr. Justice Hawkins, it is held that a tenant's fixtures, not removed during the continuance of tenancy, become on its expiration part of the freehold even though they are on the premises by the parol consent of the lessor; and though such consent might give the tenant a right of action for the value of the fixtures against the lessor if he consequently refused to permit their removal, it will give no such right as against the lessor's mortgagees who were no parties to it, should they refuse. The case was that A. was a tenant of a house and garden for the residue of a term of twenty-one years. Before the expiration of the said term it was agreed verbally with B., A.'s landlord, that A. should be at liberty to leave certain tenant's fixtures annexed to the premises on the chance of their being bought by an incoming tenant and if not so bought he was to be permitted to remove them. After the expiration of the term and while the tenant's fixtures were still on the premises, C. took possession of the house and garden as receiver for certain of B.'s mortgagees. C. refused to permit A. to remove the fixtures. It was held that no action lay against C. or the mortgagees.

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**CRUELTY TO ANIMALS: A CHAPTER OF "CHICKEN LAW."**— In *State v. Neal*, recently determined in the Supreme Court of North Carolina, there is an interesting dissertation by Mr. Justice Clark upon the rights and wrongs of chickens. The learned justice states the case and delivers the opinion of the court upon the particular phase of the law involved in the following language:—

This is an indictment for cruelty to animals, to wit, sundry Stanley County chickens, "tame villatic fowl," as Milton styles them in stately phrase. The prosecutor and defendant lived very near to each other, and their chickens were exceedingly sociable, visiting each other constantly. But, after the defendants had sown their peas, they had no peace, for the prosecutor's chickens became lively factors in disturbing both. The younger defendant, Oscar, as impetuous as his great namesake, the son of Ossian, pursued one of the prosecutor's chickens clear across the lot of another neighbor, one Mrs. Freeman,

<sup>1</sup> 75 L. T. Rep. 274.

and, intimidating it into seeking safety in a brush pile, pulled it out ignominiously by the legs, and putting his foot on his victim's head, by muscular effort, pulled its head off. Then, in triumph, he carried the headless, lifeless body, and threw it down in the prosecutor's yard, in the presence of his wife, also letting drop some opprobrious words at the same time. The prosecutor was absent. Another chicken Oscar also chased into the brush pile, and, sharpening a stick, jobbed it at said chicken, and through him, so that he then and there died; and Oscar, carrying the chicken impaled on his spear, threw it over into the prosecutor's yard. He knocked over another, and, impaling it in the same style, also threw its lifeless remains over into the prosecutor's yard, as the Consul Nero caused the head of Asdrubal to be thrown into Hannibal's camp. On yet another occasion Oscar did beat a hen that had young chickens, which, with maternal solicitude, she was caring for, so that she died, and the young ones, lacking her care, also likewise perished. The aforesaid Oscar, on other divers and sundry times and occasions, was seen "running and chunking" the prosecutor's chickens. The other defendant, Oscar's father, proposed to the prosecutor "to strike a dead line, and each one kill everything that crossed the line." The offer seemed too unrestricted, and the cautious prosecutor, whose thoughts were "bent on peace" as much as his chickens were on peas, firmly declined the dead-line proposition; but Oscar's father said he "guessed he would do that way." As the evidence limited his proceedings to this declaration-of war, without any overt act, a *nol. pros.* was entered as to him, and Oscar was left alone to bear the brunt. "Having," in the language of Tacitus, "made a solitude, and called it peace," he naturally protests against being now charged with the odium and burdens of war, which his honor has assessed at a fine of \$1.00 and costs. Both defendants and Oscar's mother went on the stand. There was no substantial contradiction of the State's evidence, but all three testified that the prosecutor had been notified to keep his chickens out of their pea patch, or they would be killed. This is the "round, unvarnished tale" of the evidence. The defendant's counsel interposed every consecutive defense from a plea to the jurisdiction to a motion in arrest of judgment. The case was tried before a justice of the peace, and the defendant appealed. In the Superior Court a bill of indictment was found by the grand jury, and the defendant was tried thereon.

Chickens come within the very terms of Code,<sup>1</sup> describing the creatures intended to be protected from man's inhumanity,—“any useful beast, fowl or animal.” Pigeons were held to be within it.<sup>2</sup> The defendants offered to show by Oscar himself that “he killed the chickens to prevent them from destroying the peas.” This was to show justification, and was properly rejected. The defendants had no more right to destroy a neighbor's chickens, when thus found damage feasant, than they would his cattle. The remedy is by impounding them till damage paid, or by an action for damage. Their destruction is not necessary to his rights. *Clark v. Kellher*,<sup>3</sup> which was a case “on all fours” with this, for killing a neighbor's chickens while trespassing after notice to keep them out. In this State, in like manner, it has been held that one has no right to lay poison, though on his own premises, for another's “egg-sucking dog,”<sup>4</sup> nor to

<sup>1</sup> § 2482.

<sup>2</sup> 107 Mass. 406.

<sup>3</sup> *State v. Porter*, 112 N. C. 887; 16 S. E. 915. <sup>4</sup> *Dodson v. Mock*, 20 N. C. 146.

kill a "chicken-eating hog," as a nuisance,<sup>1</sup> nor a "breachy hog," for the same reason.<sup>2</sup> These cases refer to and distinguish *Parrott v. Hartsfield*,<sup>3</sup> where it was held lawful to kill a "sheep-stealing" dog about to kill sheep. This is because of the fact that such animal could not be easily caught and impounded, nor could he be sold for anything to pay damages. In *Johnson v. Patterson*,<sup>4</sup> a very long and learned opinion sustains the proposition that one is not justified in strewing poisoned meat on his premises, whereby a neighbor's chickens were killed, though notice was given that this would be done if they were not kept off. It is true these were actions for damages, and not indictments for cruelty to animals; but if, even in such cases, the trespass was no defense, certainly evidence to show the trespass by an animal is incompetent in an indictment whose gist is merely the fact of cruelty or needless killing.<sup>5</sup>

After disposing of some of the assignments of error on the ground that the errors were harmless, the judgment of conviction was affirmed.

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CONSTITUTIONAL LAW: POLICE REGULATIONS—VALIDITY OF STATE STATUTE REGULATING THE HEATING OF CARS UPON INTERSTATE RAILWAYS.—In the case of *New York &c. R. Co. v. New York*,<sup>6</sup> the Supreme Court of the United States, according to the excellent syllabus in the advance sheets published by the Lawyers' Co-operative Publishing Co., hold as follows, in a learned and satisfactory opinion by Mr. Justice Harlan:—

1. Cars employed in interstate commerce are not exempt in the absence of national legislation covering the subject, from the operation of a State law forbidding under penalties the heating of passenger cars in that State by stoves or furnaces kept inside the cars or suspended therefrom.

2. Possible inconveniences cannot affect the question of power in each State to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment is appropriate and effective.

3. The authority conferred by U. S. Rev. Stat. § 5258, upon railroad companies engaged in commerce among the States does not interfere with the passage by the States of laws having for their object the personal security of passengers while travelling, within their respective limits, from one State to another on cars propelled by steam.

4. The exclusion of railroads less than fifty miles in length from the operation of a State law prohibiting stoves or furnaces inside of or suspended from passenger cars, on other than mixed trains, does not deny to other railroads the equal protection of the laws.

5. A railroad is not deprived of property without due process of law by the

<sup>1</sup> *Morse v. Nixon*, 51 N. C. 298.

<sup>2</sup> *Bost v. Mingues*, 64 N. C. 44.

<sup>3</sup> 20 N. C. 110.

<sup>4</sup> 14 Conn. 1.

<sup>5</sup> *State v. Butts*, 92 N. C. 784.

<sup>6</sup> 17 Sup. Ct. Rep. 418; affirming *s. c.* 142 N. Y. 646.

recovery of penalties against it for violations of a valid State statute prohibiting the heating of passenger cars on other than mixed trains by stoves or furnaces inside of or suspended from the cars, except for temporary use in case of accident or other emergency, where the defendant was before the court.

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DEPOSITIONS: LETTERS ROGATORY—NOT USUAL, EXCEPT IN CASES OF EMERGENCY.—In the case of *Ehrmann v. Ehrmann*,<sup>1</sup> decided last summer in the English Court of Appeal (reversing the decision of Stirling, J.) it was held that letters of request to a foreign tribunal, for the examination of witnesses abroad, should not be allowed to issue unless absolutely necessary for the purposes of justice, and only where the evidence to be obtained thereunder would be material to prove the main question between the parties, and not merely collateral evidence to fortify other evidence.

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CONSTITUTIONAL LAW: POLICE POWER—TREATMENT OF DRUNKARDS AT COUNTY EXPENSE.—In the case of *Wisconsin Keeley Institute Co. v. Milwaukee Co.*,<sup>2</sup> the Supreme Court of Wisconsin hold that a statute of that State providing for the treatment of habitual drunkards in private institutions at the expense of the counties in which they reside, on an order of a County Court, when the patient "has not the means to pay for such treatment," is unconstitutional.

The reasoning of the court, in substance, is that drunkenness produced by alcohol, opium, cocaine or other drugs does not make the subject of it a legitimate object of public charity. This is a pure assumption on the part of the court. It is an improper exercise of judicial power for a court to say that one kind of disease affords a proper subject for the exercise of public charity while another does not. The fact that the disease is self-inflicted cuts no figure in the case; since public money is constantly appropriated for the curing of persons of diseases which they have inflicted upon themselves through immoral and vicious habits. The fact that the county sees fit to bestow its benevolence upon the unfortunate drunkard by paying for his treatment in a private hospital seems to have just a little to do with the question. It would be extraordinary for a court to hold that if the State had no insane asylum, it could not provide for the keeping and care of insane persons at public expense in a private sanitarium. The opinion is a bald piece of judicious legislation—a mere judicial repealing act under the

<sup>1</sup> 25 L. T. Rep. 37.

<sup>2</sup> 70 N. W. Rep. 68.

guise and pretense of constitutional interpretation. The constitution intended to commit every question decided by the court in this case, to the legislature, and not to the court. It is untenable to say that the curing of drunkards is not a public purpose for which taxes may be laid as well as the curing of persons afflicted with any other disease, or wounded in any accidental manner, or suffering from wounds or diseases which may have been self-inflicted.

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**LANDLORD AND TENANT: DAMAGES FOR BREACH OF COVENANT TO KEEP IN REPAIR.**—In the case of *Conquest v. Ebbetts*, decided last summer in the House of Lords,<sup>1</sup> it was held, affirming the judgment of the Court of Appeals,<sup>2</sup> that in an action against an under-lessee on a covenant in a lease to keep the demised property in repair, where the under-lessee has notice of the original lease and of the covenants contained in it, the immediate lessor's liability over to the superior landlord must be taken into account in assessing the damages, and such damages are properly assessed on the basis of awarding a sum representing the diminution in value of the reversion on the termination of the underlease in consequence of the breach of covenant.

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**CARRIERS OF PASSENGERS: REJECTING A PASSENGER BECAUSE HE IS BLIND.**—In the case of *Zackery v. Mobile &c., R. Co.*,<sup>3</sup> the Supreme Court of Mississippi hold that a railway carrier of passengers cannot refuse to carry a passenger, otherwise qualified, on the sole ground that he is blind. The case was decided upon a demurrer, and this was the sole question for decision, stripped of all extraneous circumstances.

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**CONSTITUTIONAL LAW: ELECTIONS — CONSTITUTIONALITY OF VOTING BY USE OF A VOTING MACHINE.**—In a recent decision of the Supreme Court of Rhode Island, the same being an opinion of the Judges delivered to the Governor, the case being entitled "*In re Voting Machine*,"<sup>4</sup> four judges of the Supreme Court of Rhode Island (Rogers, J., dissenting), hold that the provision of the constitution of that State<sup>5</sup> that voting shall be by ballot, "and, in all cases where an election is

<sup>1</sup> 25 L. T. Rep. 36.

<sup>2</sup> 21 S. W. Rep. 246.

<sup>3</sup> Reported 73 L. T. Rep. 69; (1895)  
2 Ch. 377.

<sup>4</sup> 36 Atl. Rep. 716.

<sup>5</sup> Const. R. I., Art. 8, Sec. 2.



made by ballot of paper vote, the manner of balloting shall be the same as is now required in voting for general officers, until otherwise prescribed by law," permits of a law authorizing the use of the Mc-Tammany voting machine, by which choice is indicated by puncture of a roll of paper on which the names of candidates are printed.

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**TELEGRAPH COMPANIES: DISCRIMINATING AGAINST TELEPHONE COMPANIES.**—In *People v. Western Union Tel. Co.*,<sup>1</sup> the Supreme Court of Illinois hold (opinion by Cartwright, J.), that a telegraph company having the right to choose its own agencies for delivery of messages, and to require that messages given it for transmission be in writing, it is not a discrimination against one telephone company to refuse to deliver telegrams to its subscribers by its telephones, paying it for the use thereof, or to receive messages by its telephones to be telegraphed, though by contract with another telephone company messages are so delivered and received by means of its telephones, and that a statute requiring a telegraph company to receive and transmit messages from other telegraph companies, does not oblige it to receive and transmit verbal messages attempted to be delivered to it by telephone companies.<sup>2</sup>

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**EXPERT EVIDENCE: JURY MAY BE INSTRUCTED TO DISREGARD IF UNREASONABLE.**—In the case of *Hull v. St. Louis*,<sup>3</sup> the sole question decided by the second division of the Supreme Court of Missouri, in an opinion written by Mr. Justice Burgess, is that the evidence of expert witnesses as to the value of services is merely advisory; that the jury are not bound by it, but that it is not improper to instruct them that they may disregard it if they believe it to be unreasonable.<sup>4</sup>

<sup>1</sup> 46 N. E. Rep. 781.

<sup>2</sup> "This," said Cartwright, J., "has been the rule as to carriers, and it has been held that they cannot be compelled to contract with one connecting carrier for a through rate, or for through routing, or for through tickets, because such an arrangement has been made with another connecting carrier. *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. Ry. Co.*, 9 C. C. A. 409; 61 Fed. 158; *Little*

*Rock & M. Ry. Co. v. St. Louis S. W. Ry. Co.*, 11 C. C. A. 417; 63 Fed. 775; *Little Rock & M. Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559; *St. Louis Drayage Co. v. Louisville & N. R. R.*, 65 Fed. 39."

<sup>3</sup> 40 S. W. Rep. 89. For a prior report of the same case see 39 S. W. Rep. 446.

<sup>4</sup> The court cited: *Cosgrove v. Leonard*, 134 Mo. 419; 33 S. W. 777; *Rose v. Spies*, 44 Mo. 20; *Head v.*

**ACCEPTANCE OF BEQUEST BY STATE.**—In the case of *State v. Blake*,<sup>1</sup> the Supreme Court of Errors of Connecticut hold that a bequest tendered to the State in trust can only be accepted by the legislature, and that an act of the State Treasurer in accepting it is nugatory.

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**BREACH OF PROMISE OF MARRIAGE: EVIDENCE OF A DEFINITE CONTRACT NECESSARY TO SUPPORT THE ACTION.**—The New York Court of Appeals has lately rendered a decision in the case of *Yale v. Curtiss*,<sup>2</sup> in which it is held that the rule of law which formerly permitted contracts of marriage to be inferred from proof of such circumstances as usually attend an engagement has been changed by the statute permitting parties to testify in their own behalf. There must now, in the absence of fraud and deception, be evidence of a contract—a meeting of the minds of the contracting parties. Mere courtship, or even an intention to marry, is not sufficient. Thorough acquaintance with character, habits and disposition is essential in order to make such a contract intelligently, and the parties may, therefore, form such an acquaintance without having the inference of a contract attach. Where there is any evidence sufficient to uphold the decision of the general term of the existence of such a contract their decision is final; but where there is no evidence sustaining the contract, or when the evidence given does not show that there was a contract, then the question becomes one of law, which it is the duty of this court to review.

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**SERVICES RENDERED IN EXPECTATION OF MARRIAGE.**—In the case of *Lafontain v. Hayhurst*,<sup>3</sup> the Supreme Judicial Court of Massachusetts hold that services rendered in expectation of marriage with the party served, and without any expectation of other remuneration, will not sustain an action of *assumpsit*, even though the party served refuses the expected marriage. The remedy, if any, is an action for the breach of the contract to marry, and the offering in evidence the services as elements of damage.

Hargrave, 105 U. S. 45; Bentley v. 281; Bourke v. Whiting (Colo. Sup.),  
Brown, 37 Kan. 14; 14 Pac. 434; 34 Pac. 172.  
Stevens v. City of Minneapolis, 42 <sup>1</sup> 36 Atl. Rep. 1019.  
Minn. 186; 43 N. W. 842; Arndt v. <sup>2</sup> 45 N. E. Rep. 1125.  
Hosford, 82 Iowa, 499; 48 N. W. 981; <sup>3</sup> 36 Atl. Rep. 623.  
Price v. Insurance Co., 48 Mo. App.

**CONSTITUTIONAL LAW: INTERSTATE COMMERCE — OPERATION OF STATE POLICE REGULATIONS UPON FEDERAL RECEIVERS OF INTERSTATE RAILWAYS.**— In the case of *Pierce v. Van Dusen*,<sup>1</sup> lately determined in the United States Circuit Court of Appeals for the 6th Circuit, the court had occasion to consider the question of the operation of a statute of Ohio set out in the preceding paragraph, upon the Federal court receiver of a railroad engaged in interstate commerce. The court held that in that relation the State statute was operative. Mr. Justice Harlan vindicated the conclusion of the court upon very satisfactory reasons, and also showed that it was supported by judicial precedents.

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**WELL DUG ON BOUNDARY LINE.**— In the case of *Eltason v. Grove*,<sup>2</sup> the Court of Appeals of Maryland hold that where the owner of two adjoining lots, builds a well on one lot near the boundary line, for the use of the houses on each lot, and sells the lot on which the well is not situated, and subsequently sells the other lot, and the well is openly used for more than 30 years by the owners of both lots, and it is necessary for the reasonable enjoyment of the lot first sold, such use constitutes a servitude on the second lot.

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**CONTRACTS: PUBLIC POLICY — INVALIDITY OF CONTRACTS TO PREVENT THE FINDING OF AN INDICTMENT.**— In *Weber v. Shay*,<sup>3</sup> the Supreme Court of Ohio hold that a contract by an attorney at law to render services in preventing the finding of an indictment against one accused of crime, is illegal and void, although the attorney believes that the client is innocent; and consequently that the attorney can not maintain an action to recover the compensation agreed to be paid for such services.

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**CONSTITUTIONAL LAW: TREATIES — SUPREME LAW OF THE LAND — TREATY AS TO RIGHTS OF ALIENS PREVAILS OVER STATE STATUTE.**— In the case of *Opel v. Shoup*,<sup>4</sup> lately decided by the Supreme Court of Iowa, it was held that under the provision of the constitution of the United States<sup>5</sup> that treaties with foreign countries shall be the supreme law of the land, notwithstanding anything in the constitution

<sup>1</sup> 78 Fed. Rep. 692.

<sup>2</sup> 36 Atl. Rep. 845.

<sup>3</sup> 46 N. E. Rep. 377.

<sup>4</sup> 69 N. W. Rep. 560.

<sup>5</sup> Const. U. S., Art. 6.

or laws of a State to the contrary, that a treaty with a foreign country, conferring on its subjects, notwithstanding their alienage, a qualified right to take by inheritance lands in the United States, under the laws here controlling its descent, must prevail over a State law prohibiting aliens from taking lands by descent. It was further held that such a treaty, removing the disability upon aliens imposed by a State statute, does not alter the laws of descent of the State so as to render it unconstitutional as an infringement of the right of the State to control its internal policy.

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**CARRIERS OF PASSENGERS — EJECTING PASSENGERS FOR NON-PAYMENT OF FARE — REASONABLENESS OF RULE LIMITING AMOUNT FOR WHICH CONDUCTOR MUST FURNISH CHANGE.**— In the case of *Barker v. Central Park &c, R. Co.*,<sup>1</sup> the New York Court of Appeals held that a rule adopted by a street railway company requiring its conductors to furnish change to a passenger only to the amount of two dollars in the payment of a five-cent fare is a reasonable one in view of the convenience of the general public; and that an action could not be sustained by a passenger against the company for ejecting him from one of its cars for non-payment of fare when his only tender was a five-dollar bill, which the conductor refused to change.

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**CORPORATIONS: LIABILITY OF STOCKHOLDERS — INVALIDITY OF SALE BY STOCKHOLDER OF HIS STOCK TO THE CORPORATION, KNOWING IT TO BE INSOLVENT.**— The Supreme Court of Errors of Connecticut rendered a wholesome decision in the case of *Buck v. Ross*,<sup>2</sup> holding that where a stockholder, knowing of the corporation's insolvency, sells to it his stock, receiving fully secured notes held by it, recovery can be had of him for the benefit of its creditors, though the notes were surrendered to the payee, and he gave new notes payable to the stockholder, and secured on property other than that by which the original notes were secured.

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**COMMERCIAL PAPER: CHECK ON BANKER — PAYABLE TO NON-EXISTENT PERSON — FORGERY OF NAME OF NON-EXISTENT PAYEE.**— In the case of *Clutton v. Atterborough*,<sup>3</sup> decided in the House of Lords, it appeared that a clerk of the appellants, by fraudulently representing to

<sup>1</sup> 45 N. E. Rep. 550.

<sup>2</sup> 35 Atl. Rep. 763.

<sup>3</sup> 75 L. T. Rep. 556.

them that money was owing by them to B. for work done, induced them to draw checks payable to the order of B. in payment of the amounts supposed by them to be due. There was, in fact, no such person as B. The clerk obtained possession of the checks, and forged B.'s indorsement on them, and also receipts from B., and negotiated them with the respondent, who gave value for them in good faith. The checks were duly paid by the appellants' bankers. It was held (affirming the judgment of the court below), that B. was a "fictitious or non-existing person" within the meaning of Sect. 7, sub-sect. 3, of the Bills of Exchange Act, 1885, although the appellants believed when they drew the checks that he was a real person, and that the checks must be treated as payable to bearer, and the appellants could not recover the amounts from the respondent.<sup>1</sup>

**CONSTITUTIONAL LAW: VALIDITY OF A STATUTE PUNISHING THE SENDING OF THREATENING LETTERS BY COLLECTION AGENCIES.**—In the case of *State v. McCabe*,<sup>2</sup> decided by the Supreme Court of Missouri in 1896, it is held that the provision of the Missouri Revised Statutes of 1889, prohibiting creditors from threatening to injure the credit or reputation of a debtor, by publishing his name as a bad debtor, unless the debt is paid, is constitutional, and does not deprive the creditors of property without due process of law; nor does it limit the freedom of speech. Mr. Justice Gantt, who writes the opinion of the court, examines the question with his usual patience and urbanity. After reading his decision one is tempted to inquire what question of constitutional law will not some lawyer raise next.

**CONSTITUTIONAL LAW: POLICE REGULATIONS — VALIDITY OF A STATE STATUTE MAKING RAILWAY COMPANIES CONCLUSIVELY LIABLE FOR PROPERTY DESTROYED BY RAILWAY FIRES.**—In *St. Louis &c. R. Co. v. Matthews*,<sup>3</sup> lately decided by the Supreme Court of the United States, it was held, affirming the Supreme Court of Missouri,<sup>4</sup> that the Missouri statute of March 31, 1887, making every railroad corporation liable for all property injured or destroyed by fire from its locomotives, and giving it an insurable interest in the property for its protection, is con-

<sup>1</sup> *Bank of England v. Vagliano* (64 L. T. Rep. 353; (1891) A. C. 107) followed.

<sup>2</sup> 37 S. W. Rep. 128.

<sup>3</sup> 17 Sup. Ct. Rep. 243.

<sup>4</sup> 121 Mo. 298; s. c. 25 L. R. A. 161.

stitutional and valid. Such statute neither violates any contract between the State and the railroad company, nor deprives the company of its property without due process of law, nor denies it the equal protection of the laws. The opinion of the court, which is written by Mr. Justice Gray, is laboriously exhaustive and shows that the decision which the court now renders is in strict accord with many of its previous holdings.

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**JUDGES: PERSONAL LIABILITY OF, FOR THEIR OFFICIAL ACTS.**—The case of *Terry v. Wright*,<sup>1</sup> lately decided in the Court of Appeals of Colorado, furnishes a learned exposition of the doctrine that the judge of a superior court of general jurisdiction cannot be made personally liable for an act done in the exercise of his office, although in excess of his jurisdiction,—the immunity being founded in public policy, and being deemed necessary to support the independence of the judiciary. Therefore a county court judge in Colorado cannot be made liable, nor can the sureties on his bond, for finding a person guilty of contempt without citation, and imprisoning him in jail for disobedience of a judicial order.

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**DEVISES — RULE IN SHELLEY'S CASE — NOT TO OVERRIDE THE PLAIN INTENTION OF THE TESTATOR.**—Whenever the courts so handle the rule in Shelley's case as not to allow it to override the plain intention of the testator, then it ceases to be a "rule." The objections to that "rule" are that it does not override the plain intent of the testator in nearly, if not all, the cases where it is applied. In the case of *De Vaughn v. Hutchinson*,<sup>2</sup> the Supreme Court of the United States do not allow it to override the intent of the testator where there are explanatory or qualifying expressions which show plainly what that intent was. Accordingly where there was a devise to a person for life, with remainder to the heirs begotten of his body, and their heirs and assigns forever,—it was held that the first taker had an estate for life, and that his children took as purchasers an estate in fee.

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**COVENANTS RUNNING WITH THE LAND — LEASE OF HOTEL — COVENANT NOT TO BUY WINES, ETC., EXCEPT FROM LESSOR.**—In the case of *White v. Southern Hotel Co.*,<sup>3</sup> the English Court of Appeal hold the following

<sup>1</sup> 47 Pac. Rep. 905.

<sup>2</sup> 17 Sup. Ct. Rep. 461.

<sup>3</sup> 76 L. T. Rep. 273.

propositions in learned opinions: A covenant by the lessee contained in the lease of an hotel that he will not during the term created by the lease buy, receive, sell, or dispose of, in, upon, out of, or about the premises any wines or spirits other than shall have been *bonâ fide* supplied by or through the lessor (a wine and spirit merchant), his successors or assigns, is a covenant which runs with the land, and is binding on the assigns of the lessee, even though such assigns are not mentioned. And where such covenant is coupled with a proviso for abatement from the rent so long as the lessee shall well and truly observe the covenant, the assigns of the lessee are entitled to the benefit of the proviso, and may claim the abatement, notwithstanding that the ownership of the business of the lessor and the ownership of the reversion have been severed by a sale of the business, while they continue to obtain wines and spirits from the purchasers of the business.

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**MANDAMUS: TO COMPEL STREET RAILWAY COMPANY TO OPERATE ITS LINE.**—The doctrine, so often applied, that a franchise granted to a corporation to carry on a strictly public duty, although for its private gain, carries with it an obligation toward the public to perform that duty, has been held by the Supreme Court of Texas, in a learned opinion by Gaines, C. J., not to apply in such a sense that a court will issue its writ of mandamus to compel a street railway company to continue to operate its lines on certain streets, where its charter imposes no specific obligations, and the ordinance giving the franchise in the streets merely granted "the privilege" of constructing and maintaining street railways over the lines therein designated.<sup>1</sup>

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**JUDICIAL SALES: SUMMARY REMEDY TO COMPEL PAYMENT OF PURCHASE MONEY AT RECEIVER'S SALE.**—In the case of *McCarter v. Finch*,<sup>2</sup> the Court of Chancery of New Jersey in a learned opinion by Vice-Chancellor Pitney, which goes over the learning of the subject, holds that that court has jurisdiction, by summary proceeding upon petition, to compel the payment by a purchaser from an officer of the court of the agreed price of goods sold and delivered by such officer. This is in line with what we understand to be the general doctrine, that one who purchases at a sale by an officer of a court, for example at a sale

<sup>1</sup> San Antonio Street R. Co. v. State, 85 S. W. Rep. 926.

<sup>2</sup> 36 Atl. Rep. 937.

by a receiver under a decree foreclosing a mortgage, subjects himself to the jurisdiction of the court and makes himself a party to the proceeding so far as to enable the court to enforce, by proper proceedings against him, the performance of his contract of purchase.

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**ILLEGAL CONTRACT — AGREEMENT OF ATTORNEY TO PREVENT RETURN OF INDICTMENT AGAINST CLIENT.**— In the case of *Weber v. Shay*,<sup>1</sup> the Supreme Court of Ohio, according to its official syllabus, held that a contract by attorneys at law to render services to prevent the finding of an indictment against one accused or suspected of crime is illegal and void, without respect to the belief of such attorneys as to his guilt, and compensation stipulated to be paid for such services cannot be recovered. Such contract is illegal because of its corrupting tendency; and it should not be left to a jury to determine whether, in its execution, acts were done to contravene public morals or subvert the administration of justice

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**PRIVATE INTERSTATE LAW: TORT COMMITTED IN ONE END OF INTERNATIONAL TUNNEL.**— In the case of *Turner v. St. Clair Tunnel Co.*, lately decided by the Supreme Court of Michigan,<sup>2</sup> the defendant was engaged in constructing a tunnel under the St. Clair river between the State of Michigan and the Province of Ontario, in the Dominion of Canada. So engaged, the agent of the defendant sent the plaintiff, who was in its employ, on the American side, to the Canadian side to work at that entrance of the tunnel, and while so working there, the plaintiff was injured. It is held that, whether or not the defendant is liable in damages for the injury on the ground of negligence in putting the defendant upon a dangerous work, was to be determined in accordance with the law of Canada.

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**TRIALS: ABSENCE OF THE JUDGE FROM THE COURT ROOM.**— In the case of *Smith v. Sherwood*,<sup>3</sup> the Supreme Court of Wisconsin hold that for a judge to absent himself from the court room for a considerable length of time during the argument of the case, is ground for the reversal of the judgment.<sup>4</sup>

<sup>1</sup> 46 N. E. Rep. 377.

<sup>2</sup> 70 N. W. Rep. 146.

<sup>3</sup> 70 N. W. Rep. 682.

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<sup>4</sup> The court cite: *Thomp. Trials*, Sec. 955; *Brownlee v. Hewitt*, 1 Mo. App. 360; *State v. Claudius*, *Id.* 551.



**TRUSTS AND MONOPOLIES: UNITED STATES ANTI-TRUST ACT — WHAT TRUSTS DO NOT AFFECT INTERSTATE COMMERCE.**—The decision of the Supreme Court of the United States in the case of *United States v. E. C. Knight Co.*,<sup>1</sup> is already bearing a miserable crop of fruit. In the case of *United States v. Addyston Pipe & Co.*<sup>2</sup> it was held that a trust to monopolize the markets of the whole country in the trade of cast iron pipe, affected interstate commerce only incidentally and not directly, and did not present a case within the anti-trust act of July 2d, 1890. It was so held, although the trust was composed of corporations manufacturing this commodity in four different States, to wit: Ohio, Kentucky, Tennessee and Alabama. It was so held, although the corporations entering into this corporation were practically the only manufacturers of cast iron pipe in thirty-six States and Territories. This being the nature of the combination and this being the great market which it sought to monopolize, it seems that the view that it affects interstate commerce incidentally merely, is so untenable as to border on the uncandid.

**SHERIFF: TRESPASS FOR ILLEGAL LEVY — NECESSITY OF PROVING JUDGMENT AS WELL AS EXECUTION.**—In the case of *Kirchhoffer v. Clement*,<sup>3</sup> the Supreme Court of Manitoba, in a very elaborate judgment involving a number of questions, had occasion to consider a question which, though not new, is certainly interesting. After a careful examination of the subject, the learned judges held unanimously that, in a case where a third party brings an action against a sheriff for an illegal seizure of his goods under an execution, and establishes a *prima facie* case of title in his own favor as against the debtor in execution, the sheriff, in order to justify, must prove a valid judgment as well as a *prima facie* valid execution.<sup>4</sup>

<sup>1</sup> 156 U. S. 1. For comments on this decision see 29 Am. Law Rev. 298.

<sup>2</sup> 78 Fed. Rep. 712.

<sup>3</sup> 11 Manitoba Law Rep. 460.

<sup>4</sup> The distinction seems to be an old one. It seems to be that, in trespass against a sheriff for seizing goods on execution, brought by the person against whom the execution is issued, the sheriff need not prove that there was a valid judgment, because the plaintiff is a privy to it; whilst in a similar action by a third person claim-

ing the goods the sheriff must make such proof. *Lake v. Billers*, 1 Ld. Raym. 738; see also *Martyn v. Podger*, 5 Burr. 2631; *White v. Maurice*, 11 C. B. 1015 (where the previous authorities are reviewed); and *Bissey v. Windham*, 6 Q. B. 166, where it is denied. The Manitoba court also examine several Canadian cases on the subject. *McLean v. Hannon*, 3 Sup. Ct. Can. 706; *Crowe v. Adams*, 21 Sup. Ct. Can. 342.

**BANKS AND BANKING: INSOLVENCY — ILLEGAL PREFERENCE IN PAYING A DEPOSITOR DURING A RUN.**— The case of *Stone v. Jenison*,<sup>1</sup> lately decided by the Supreme Court of Michigan,<sup>1</sup> probably has more in it than can be stated in a sentence or two. The judges were divided in opinion, but if we are not mistaken the case may be quoted in favor of the conclusion — obvious on principle — that so long as a bank resists a run and pays out its funds in good faith to depositors as fast as they crowd up to the window of the paying teller, believing that it will be able to restore public confidence, and that it will not be driven to the necessity of closing its doors,— the depositors who get paid under such circumstances do not obtain an illegal preference. But at the same time, a payment during even a slight run may be made to a particular depositor under such circumstances as to constitute an illegal preference. Suppose, for example, in view of the possible danger to the bank of a run, a bank official gives a “tip,” so-called, to a favored depositor to draw out his deposit, and the bank soon afterwards fails,— this undoubtedly might be regarded as an illegal preference. On the other hand, it is obvious that in every run upon a bank, the time comes, if the run is successful, when the window must be shut down, and it cannot be said that the last depositor who gets his money out before the directors realize their defeat and order the window down, gets an illegal preference. He gets merely a payment, made to him in good faith and in the ordinary course of business. If he is to be deemed to get an illegal preference, how far back can you go? Can you go to the very commencement of the run, and if so by what test can you determine at what precise point the run commences, and if you can go to the commencement of the run, why can you not go further back? Many banks are known to have done business after being completely hollowed out for years, subsisting upon their ancient credit. In such a case how far back could a court of justice go in undoing the payments made in the regular course of business of the bank to its depositors, on the ground of avoiding illegal preferences?

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**CONSTITUTIONAL LAW: PROHIBITION AGAINST THE HOLDING OF TWO OFFICES — GOVERNOR AND MAYOR OF A CITY.**— In *Attorney-General v. Common Council*,<sup>2</sup> the Supreme Court of Michigan had occasion to consider whether a Mayor of a city who had, while holding that office, been elected to the office of Governor of the State and entered upon

<sup>1</sup> 70 N. W. Rep. 149.

<sup>2</sup> 70 N. W. Rep.

the duties of the latter office, thereby, *ipso facto*, vacated the former. The case was that of Hazen S. Pingree, who, while Mayor of Detroit, was elected Governor of Michigan and qualified as Governor and attempted to discharge the duties of both offices at the same time. The constitution of Michigan provides that "no member of Congress nor any person holding an office under the United States or this State, shall execute the office of Governor."<sup>1</sup> The principal question for decision, therefore, was whether the office of the Mayor of the city of Detroit was, within the meaning of the above constitutional provision, an office "under this State." The court, in a very learned opinion by Mr. Justice Hooker, held that it was. The learned justice summarized the decisions in other jurisdictions as follows:—

Many cases have arisen upon similar provisions of the various constitutions, and, while the decisions are not altogether uniform, we shall find them in substantial harmony upon two propositions, viz.: First, that an officer of a city, whose duties are simply and purely municipal, and who has no function pertaining to State affairs, does not come within the constitutional description of officers holding office under the State; and, second, where officers in cities are appointed or elected by the community in obedience to laws of the State which impose duties upon them in relation to State affairs, as contradistinguished from affairs of interest to the city merely, such as relate to gas-works, sewers, water-works, public lighting, etc., they are upon a different footing, and may properly be said to hold office under the State.

The court held that, as the effect of the constitutional provision was to prohibit Mr. Pingree from holding both offices, by accepting and executing the office of Governor of the State he vacated the office of Mayor; and this was so although when he accepted the nomination for Governor he made a public declaration of his intent to continue to perform the duties of Mayor. The court accordingly awarded a mandamus to compel the Common Council of Detroit to order an election to fill the vacancy in the office of Mayor.

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THE LAW OF STRIKES: RESPONSIBILITY OF UNION WORKMEN WHO STRIKE BECAUSE NON-UNION WORKMEN ARE EMPLOYED.—This question has come up in two or three recent cases. In the case of *Gauthier v. Perrault*, decided by the Court of Appeals of the Province of Quebec at Montreal on the 24th of February last, there was a division of opinion upon the question whether workmen who, without resorting to threats, violence, intimidation or other illegal means, quit work because

<sup>1</sup> Const. Mich. Art. 5, § 15.

a non-union workman is employed in the same establishment, incur any legal responsibility toward the latter. The majority of the court were also of opinion that the plaintiff, having left his work voluntarily, notwithstanding an intimation from his employer that he was at liberty to stay, had not suffered any damage recoverable at law. But this conclusion appears to be weak, when it is considered that it was impossible for him to do otherwise than quit his work because he could not do his work alone, and the departure of the union workmen engaged in the establishment involved the closing of the establishment.

Next comes the sound and wholesome decision of the New York Court of Appeals, delivered in March last, in the case of *Curran v. Galen*.<sup>1</sup> That case proceeds on the principle that public policy and the interests of society favor the largest liberty in the citizen to pursue his lawful trade or calling; for which reason, if the purpose of the organization or combination of workingmen be to hamper or restrict that liberty, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, their purpose is unlawful. The case was that the plaintiff, who had been discharged from employment by a brewing company, brought an action against the defendants for conspiring and confederating together to procure his discharge and prevent him from obtaining employment. The defendants in their answer alleged as a defense that they were members of a Workingman's Assembly, Knights of Labor, which had an agreement with the Brewers' Association, composed of the brewing companies, that all their employes should be members of the assembly, and that no employe should work for a longer period than four weeks without becoming such member; that what the defendants did in obtaining the plaintiff's discharge was as members of the assembly, and in pursuance of this agreement, upon his refusing to become a member. Plaintiff demurred to this defense. The court held that the defense was insufficient in law, and that the demurrer should be sustained. The decision of the court appears to have been unanimous, but one of the judges did not sit, and we are sorry to say that the opinion was *per curiam*, which indicates that no single judge of an elective court was willing to bear the brunt of writing an opinion which would displease such a powerful body of voters as the Knights of Labor.

Still another case of the same kind is *Vegelahn v. Guntner*,<sup>2</sup> decided

<sup>1</sup> 46 N. E. Rep. 297; affirming *s. c.*  
28 N. Y. Supp. 1184, mem.

<sup>2</sup> 44 N. E. Rep. 1077.

by the Supreme Judicial Court of Massachusetts. This case related to what, we believe, is called picketing. The court held that the maintenance of a patrol of two men in front of plaintiff's premises in furtherance of a conspiracy to prevent, whether by threats and intimidation or by persuasion and social pressure, any workman from entering into or continuing in his employment, ought to be enjoined.

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**FEDERAL JURISDICTION: POWER TO SET ASIDE A JUDGMENT OF DIVORCE IN A STATE COURT ON THE GROUND OF FRAUD.**—In January last a remarkable decision was rendered by Mr. Federal Circuit Judge McKenna in the case of *McNeil v. McNeil*.<sup>1</sup> The suit was a bill in equity to declare void, and to restrain the enforcement of, a judgment of divorce, and for an injunction to restrain the disposition of property. It is to be inferred that the disposition of property made by the judgment of the State court was merely an incident to the principal subject-matter of the judgment, which was that of domestic status. Judge McKenna held that the Federal court has such jurisdiction; but, as the wife, who was the plaintiff in the suit, had delayed bringing her suit for eighteen months after discovering the fraud and had given no explanation in her bill of her laches, he held that a demurrer to the bill ought to be sustained on this ground, but with leave to amend, alleging causes and excuse for delay. We have no idea that a court of the United States has jurisdiction to annul a judgment of divorce pronounced in a State court, on the ground of fraud. The opinion of Judge McKenna admits that courts of the United States have no jurisdiction to grant divorces. He does not satisfactorily explain how a court which can not grant a divorce acquires jurisdiction to put the parties together again after they have been divorced. He says: "Here there is no question if the parties may be divorced or must remain together, no question of the grounds of divorce. It is a question purely of chancery jurisdiction. For what the judgment was rendered is not essential." It would have been more satisfactory if the learned judge had cited some cases in which the English Court of Chancery had, on the ground of fraud, set aside a decree of divorce granted in the ecclesiastical court, and reinstated the parties in the relation of husband and wife. Except as regards the custody and guardianship of infants, it is of the very essence of chancery jurisdiction that it deals with the rights of property only, and not with matters of crime or of domestic

<sup>1</sup> 78 Fed. Rep. 834.

status. If the judgment of the State court awarding alimony had been the principal thing, and the judgment severing the bonds of matrimony merely an incident thereto, then it might be plausibly argued that a court of chancery would have the power to set aside the decree on the ground of fraud. But even then, so far as it related to matrimonial status, it would, from the very nature of the case, elude Federal jurisdiction.

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**CREMATION: WHEN NOT A PUBLIC NUISANCE** — Two judges in India have decided in the case of *Pillai v. Pillai*,<sup>1</sup> that the burning of a corpse on a burning ground close to a public pathway and so near the bathing ground of an adjoining village that the noxious effluvia disturbed the passers-by and the bathers, was a public nuisance, not by reason of the fact that this mode of disposing of the dead was resorted to, but by reason of the place where the burning took place. The case is commented upon at considerable length in the *Madras Law Journal*,<sup>2</sup> and the regret is expressed that no statutory provision exists conferring upon the local boards of rural districts the power of regulating burning grounds, such as exists with respect to Madras and certain municipalities. In a subsequent stage of the same case<sup>3</sup> which was a petition for leave to appeal before the Judicial Committee of the Privy Council, it appeared that the accused burnt a corpse on the cremation ground of their village, situated near the bathing ghaut of another village and a public road and were in consequence charged with committing a public nuisance. The High Court held "in India the burning of dead bodies by the inhabitants of a village, in a particular spot attached to that village and dedicated for the communal purpose of cremation, in a manner neither unusual, nor calculated to aggravate the inconvenience necessarily incident to such an act as it is generally performed in the country, is lawful and does not amount to a public nuisance, punishable under the Indian Penal Code." Thereupon the complainant applied to the Privy Council for leave to appeal, which was refused.

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**NEGLIGENCE: LIABILITY OF ELECTRIC LIGHT COMPANY FOR DEATH OF TELEGRAPHIC LINEMAN COMING IN CONTACT WITH WIRE NOT INSULATED.** — In the case of *Newark Electric Light &c. Co. v. Garden*,<sup>4</sup>

<sup>1</sup> L. L. R., 19 M. 464.

<sup>2</sup> 7 Madras Law Journal, part II., 33.

<sup>3</sup> Vol. 6, page 429, *et seq.*

<sup>4</sup> 78 Fed. Rep. 74.

the United States Circuit Court of Appeals for the third circuit had before it a close question, according to the syllabus, which fairly represents the decision. What the court ruled was that an electric light company, which maintains wires carrying an electric current of high power on poles used, in common with it, by other companies for the support of their wires, owes to an employé of one of such other companies, who is unlawfully upon the pole, in pursuance of the common right, the duty of exercising ordinary care to keep its wires so safely insulated as to prevent injury to such employé, though, in the performance of his work, he may enter upon a separate cross-arm of the electric light company, or accidentally touch its wires. The court, in his opinion, written by Dallas, Circuit Judge, while conceding that the deceased may have been technically a trespasser upon the cross-arm of the defendant's pole, yet nevertheless held that the circumstances were such that the defendant was bound to anticipate that the linemen of other companies using the pole might have occasion to support themselves upon its cross-arm, and was bound to exercise reasonable care to the end that such place of support should not, by the failure to keep its wire insulated, become a death trap to such lineman. The court repelled the idea that because one is technically a trespasser upon the property of another, the latter owes him no duty of taking care to prevent killing or injuring him. The true question was, was the deceased a trespasser in any such sense as would excuse the defendant for the negligence resulting in his death.<sup>1</sup> Acheson, Circuit Judge, dissented, on the ground that it did not appear that the defendant had violated any duty which it owed to the deceased in not taking care that this wire be kept insulated, and that the deceased, being an experienced lineman, met his death in consequence of a danger of which he had knowledge and of which he had been frequently warned. Being a volunteer, he assumed the risk of the calamity that overtook him.

<sup>1</sup> On the question the court cited *McDonald*, 152 U. S. 262; *s. c.* 14 Schilling *v.* Abernethy, 112 Pa. State Sup. Ct. Rep. 619. 487; *s. c.* 3 Atl. Rep. 792; *Ry. Co. v.*

CORRESPONDENCE.

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## THE TRIUMPH OF FILTH.

*To the Editors of The American Law Review:*

I was very glad to see what you said about D'Annuncio's "Triumph of Death." That writer is one of the most notorious of the modern apostles of filth; and his books are a shame and a disgrace to the age in which we live. It is gratifying to know that such beastly productions are short-lived. Disgusting as is the taste of many of the present generation, Zola is finding that there is now only a small sale for his vile literature, compared with which the *Police Gazette* is chaste reading, though his writings are less nauseous than those of D'Annuncio. \*



## BOOK REVIEWS.

**JONES ON EVIDENCE.**— *The Law of Evidence in Civil Cases.* By BURE W. JONES, of the Wisconsin Bar, Lecturer in the Law School of the University of Wisconsin. In three Volumes: pages XXVIII and 2198. San Francisco: Bancroft, Whitney Company. 1897.

The author of this work has long been recognized as one of the most learned of Wisconsin lawyers. His long experience as a practitioner and as a teacher of the law of evidence in one of the most reputable law schools of the country, together with the abundant facilities offered by the State Law Library at Madison for the preparation of the work under review, have amply fitted him for his task.

It requires a nice and accurate discrimination to determine what should be included in and what should be left out of a treatise upon the law of evidence. This subject, based as it is upon a comparatively few leading and fundamental principles, is capable of almost indefinite expansion. The reason is obvious when we but stop to consider it. To successfully invoke the operation of a rule of substantive law, the party must establish a given state of fact. The facts to be proved and the method by which they are to be established form what is called the law of evidence. It will thus be seen that a comprehensive treatise upon this subject would embody, in substance, a treatise upon our entire legal system; and the careful reader will note that, by a simple process of transposition of terms, a rule of evidence governing a particular condition of fact may be readily made to state a rule of substantive law applicable to the case in hand, without any material change of the substance. No writer, however diligent, would be able to prepare an exhaustive treatise upon this subject, giving the application of the rules and principles to the almost infinite variety of facts which come before our courts for consideration. The best that can be hoped for is a clear and concise statement of the leading principles whose wisdom and utility have stood the scrutiny of generations of courts and lawyers, together with the new rules which have been the outgrowth of the more liberal and humane spirit of modern times; and to illustrate those principles and rules by copious references to the cases. In a general treatise, strictly confined to the subject in hand, a statement of the rules applicable to the cases which ordinarily come before the judicial tribunals, with illustrations sufficiently numerous and varied, is all that must be expected. The application of the rules as found in the treatise must be made by the practitioner to each individual case as it arises.

The subject has been divided by the author into three branches: 1. Those matters and facts the existence of which is either presumed, or which the court will take judicial notice of. 2. The rules governing the introduction and admissibility of evidence. 3. The general subject of witnesses; their competency and privileges, and rules for their examination both before examining officers and in court, together with the practice governing in such matters.

One of the weaknesses of many writers lies in the assumption that the reader is familiar not only with the ordinary definition of terms, but also with the manner in which the terms are used by the author. This assumption has been the cause of obscurity in many able works. Definitions of terms employed form the groundwork of all well-written treatises. Upon no subject is a thorough understanding of the terms employed more important than in that of evidence. The first chapter is somewhat deficient upon this point. The chapters upon "Presumptions" are very full, and the reader will find in them much of interest.

The underlying principle governing "Judicial Notice" is that courts must be presumed to know as much as ordinary people concerning matters of public and general knowledge and repute. The difficulty in applying this principle lies in the wide divergency of opinion as to just what matters are of such public and general knowledge and repute that no evidence is required. The philosophical discussion and the numerous authorities cited by the author cannot fail to satisfy the requirements of the most exacting.

If the rules of evidence were capable of being reduced to the same degree of exactness, and if their applications were capable of being made universal, like the principles of logic, much time and labor would be saved. But so different are the rules which govern the conduct of the human species from the principles underlying the operation of the mind in its relations to matter, that no treatise is complete without its chapter on "Relevancy." This subject has always been a difficult one to handle. It pervades the entire body of the law of evidence. While it is desirous to have the rules of evidence and the principles of logic harmonize, experience of the past has proved to the satisfaction of courts and lawyers that a too strict application of the principles of logic to the motives and conduct of men, tends, in numerous instances, on account of the many matters which the logician can not take into account, to work grave injustice. Hence the necessity of careful distinction between logical and legal relevancy. A discussion of this subject should point out the respects in which the rules of evidence and the principles of logic are in accord, and should further disclose wherein they differ; and the reasons which render inapplicable the strict principles of logic in the trial of a legal action should be carefully considered and pointed out.

Considerable space is devoted to the "Burden of Proof," "Admissions," "Hearsay," "Opinions," "Real Evidence," and "Statute of Frauds." The chapters upon "Parol Evidence" and "Documentary Evidence" are very satisfactory. The latter topic is of especial interest on account of the exhaustive treatment of such subjects as proof of handwriting, certificates of public officers as evidence, books of account, and judgments, and much of interest will be found and many novel rules and principles are discussed.

To eliminate from a treatise upon the rules of evidence all discussions of the law governing the "competency," "production" and "examination" of witnesses would greatly impair its usefulness to the student, and render the work of diminished value to the practitioner. The third volume treats of these subjects with great learning. The first chapter is devoted to the production and examination of witnesses before examining magistrates, the powers and duties of these officers, of the rules regulating the taking of depositions, and of their introduction and use in evidence. The subject of "Discovery" and the

examination of adverse parties has hardly received the attention which its importance warrants.

The "Competency of Witnesses" has been ably and exhaustively discussed, and the growth of the more liberal rules of modern times has received due consideration. The remainder of the volume is devoted to a discussion of the rules relating to the attendance and examination of witnesses. In this is embodied a consideration of the "privileges of witnesses," "impeachment of witnesses," "use of memoranda to refresh their recollection," and kindred topics.

The exhaustive index, comprising nearly two hundred pages, gives the principal subjects in black print, the subheadings in italics, and the references to the sections in ordinary faced type, thereby making it easier to find the point desired. The mechanical execution of the book is all that can be desired. While the volumes are small and compact, belonging to what is known as the "Pony Series," the type is clear and sufficiently large to be read without straining or tiring the eyes.

The careful reader has long since discovered that not every book in law sheep is a legal treatise. Many of the works which now incumber our shelves are but little better than digests, and, in many instances, their room is better than their presence. The marks of honesty and industry in legal authorship, while hard to define and to point out, leave their traces stamped in unmistakable signs upon the pages of great works of acknowledged authority and accuracy. The competition in law-book making has so reduced the profits of legal authorship that it does not pay men of high ability to engage in that pursuit. The result is that practitioners are depending less and less upon text-books, and more upon the reports and original research. When a book is put upon the market, bearing all of the marks of painstaking care and labor that this book bears, the profession cannot fail to appreciate it.

The number of citations, in this work, both English and American, is enormous, and the authorities seem to have been exhausted in its preparation. Every section is a brief upon the subject discussed. Another feature which will commend it to the busy practitioner is its copious references to the standard law journals, periodicals, and to the American and Lawyers' Series of reports. This furnishes a key to a great volume of learning, and renders it easy for the searcher to exhaust his subject without the labor incident to original research upon the question in hand. It might be suggested that the value of this work would have been greatly increased by cross-references to the cases in the "Reporter System." Few lawyers are without at least one of these series of reporters; and publishers must learn to stifle any jealousies which may have been engendered in the past, to the end that the profession may receive the full measure of the benefit which modern methods of law reporting have conferred.

This work has already taken its place at the head of the list of books upon the law of evidence, and is being cited as primary authority in our courts. It is more exhaustive than any other treatise which has come under the writer's observation, and the low price at which it is sold will enable it largely to supplant all others, not only as a text-book in the schools, but as the leading work used in general practice.

WILLIAM D. THOMPSON.

RACINE, WIS.

**TRATADO DE DERECHO INTERNACIONAL PRIVADO:** por el DR. ANTONIO S. DE BUSTAMANTE Y SIRVÁN, Profesor Numerario de Derecho Internacional Público y Privado é Historia de los Tratados en la Universidad de la Habana: *Asocié* del Instituto de Derecho Internacional. "Summ cuique reddere." Tomo I. Nociones Preliminares. Historia de Derecho Positivo. Historia del Derecho Científico. Habana, Cuba. Imprenta y Papelería "La Universal," de Ruiz y Hermano. Calle de San Ignacio núm. 15. 1896. pp. 550. Precio: \$3.50 Plata.

A remarkable book from every standpoint whence one chooses to view it, is this Treatise on Private International Law, the first volume of which it has been my very agreeable task to read for review. The author, Señor Bustamante, is Professor of Public and Private International Law and the History of Treaties in the University of Havana, Cuba. This entire volume of 550 pages is devoted to a profound and luminous inquiry into the principles and sources, historically and scientifically considered, of private international law; in other words, as he indicates, the history of the positive law and the history of the scientific law. This English word "law" which I use in translation is but an imperfect rendition of the "derecho" or French "droit" of which we treat,—the abstraction "jus" of the Romans, which we are to understand as the sense of the word "law," as here used.

The author's definition of private international law it is important to cite in his words, as "the sum total (*conjunto-ensemble*) of the principles which determine the limits in space of the legislative competence of States when it is to be applied to the juridical relations which may be subjected to diverse legislations"—a definition which has the merit of being comprehensive, and of embracing the theoretic as well as positive law. But a very pertinent remark in criticism of this definition I encounter in a leading review of this work in the "Revue de Droit International," where M. Albéric Rolin, in an eulogistic commentary of the Treatise, acutely observes: "We ask if it would not be well to point out clearly that 'droit international privé' determines also the private rights of the human being, within the sphere of a sovereignty other than that to which he belongs by the ties of subjection, and to note that it limits the legislative competence only in what concerns the relations of *droit privé*. In a word, the words 'which may be subjected to diverse legislations,' do not entirely satisfy us. It is not necessary that the juridical relations may be in fact subjected to diverse legislations in order that private international law should apply to them; it suffices that a doubt should arise as to which legislation they are subjected to." This modification is important for an adequate concept of private international law, and will no doubt be readily accepted as a material part of an exact definition.

Señor Bustamante examines and discusses very thoroughly the several theories which have been advanced as to the foundation of private international law. According to him, it is founded upon the juridical community of the nations, a theory already suggested by some authorities such as Saurez and Savigny as the true basis of this law. This theory is developed elaborately by Sr. Bustamante, and he points out the different factors of this juridical community of nations. He makes a very erudite and thorough study of the many attempts made to remedy the grievous inconveniences and conflicts growing out of the diversity of legislation in the different States, and especially notes the essays at codification of the private international law which have engaged the earnest efforts of the highest juristic minds of all the great nations.

Other chapters of the first book treat of the differences between private and public international law, of the sources of the latter, and of the extensive bibliography of this vast theme of law. The branches of civil and criminal international law, the laws governing the physical and juridical person, the relations of family, guardianship, property, succession, etc., all fall within the scope of this really vast and exhaustive work. The historical portion of the work is especially interesting in whatever relates to Spain with reference on the one hand to the Moors, and on the other to the peoples of America in consequence upon the discoveries of Christopher Columbus.

On the whole, the work is a monumental contribution to the learning of this great subject and to the learning and ability of the author, and deserves a high place in the ranks of the publicists. Other volumes completing the great scheme of international jurisprudence will appear from time to time, which we will notice with much satisfaction, judged by that which this volume has afforded.

JOSEPH WHELESS.

ST. LOUIS.

**DEVLIN ON DEEDS.**—A Treatise on the Law of Deeds: their Form, Requisites, Execution, Acknowledgment, Registration, Construction and Effect; Covering the alienation of Title to Real Property by Voluntary Transfer. Together with chapters on Tax Deeds and Sheriff's Deeds. By ROBERT T. DEVLIN, Counselor at Law. Second Edition, Revised and Enlarged. In Three Volumes. San Francisco: Bancroft-Whitney Co. 1897.

The first edition of this scholarly and satisfactory work, published in 1887, was reviewed by us at the time.<sup>1</sup> The favor with which it has been received by the profession, calling for this revised and enlarged edition, justifies the words of praise which were then accorded to it. Doubtless there were inequalities and imperfections in that first edition, as there are in the first edition of every treatise, and we doubt not that they have been corrected, for the most part, in this second edition. If they have not, it cannot be from a want of industry on the part of the learned author; for its fruits are apparent on every page in a wealth of citations and annotations illustrative of the text. We can well believe that the author has, as stated in the preface to this edition, examined every case which has been decided since the first edition, and the notes give every indication that the examination has been that intelligent, pondering examination which the conscientious author gives to a case before citing it to a proposition. The revision has been a revision of the whole work, not a mere accumulation of additional citations to a practically unchanged text. Mr. Devlin says in the preface to the second edition: "Many new sections have been added to the text; others have been rewritten or enlarged, and ample additions have been made to the notes. I have at all times kept in mind the fact that a work intended for a practicing lawyer should contain many different features, and I have, in the insertion of new matter, followed the same general outlines described in the original preface as the plan of this treatise. The enormous number of new cases considered has necessitated the extension of the work to three volumes. Special attention has been given to those topics that relate particularly to the form, execution, acknowledgment, delivery and registration of deeds, description of property conveyed, and kindred subjects relating to deeds, considered as instruments intended to convey

title to land. Still, their effect as executed contracts has been exhaustively considered. Every chapter has been revised and enlarged, and the new matter inserted has been thoroughly indexed." A fuller exposition of Mr. Devlin's conceptions of the plan on which a legal treatise should be written will be found in the preface to the first edition; a preface which would well repay the careful study of the intending author. It is but justice to say that Mr. Devlin has successfully achieved the task which he set for himself, and has given to the profession a work of practical and enduring value. The book has the mechanical excellence which is characteristic of the works issued by the publishers.

**WOODRUFF'S CASES ON DOMESTIC RELATIONS.**—A selection of cases on Domestic Relations and the Law of Persons. By EDWIN H. WOODRUFF, Professor of Law in the College of Law, Cornell University. New York: Baker, Voorhis & Co. In one Volume, cloth binding. Price, \$4.00. 1897.

This collection of Cases is divided into nine parts: Part I relates to the prolific subject of Marriage, and occupies about half the entire volume. It is divided into four chapters, as follows: 1. Contract to marry. Breach of Promise. 2. Contract of marriage. 3. Husband and Wife. 4. Divorce and Separation. Part II treats of Parent and Child; Part III, of Infancy; Part IV, of Insanity. Part V, of Drunkenness; Part VI, of Aliens.

There is a good Table of Contents, giving the names of the cases with the reports, and the subjects to which the cases relate. These are given in the order of the parts and chapters, or in other words in the order in which the cases appear in the volume. The statement of the subjects of the cases cannot impair their use in the law school, while it renders the collection of some use to the profession. There is also a Table of Cases arranged alphabetically; and also an index to the volume.

The cases are wholly American, and claim to be selected with good care and discrimination. The volume is well printed and has a pleasing appearance.

**PROBATE REPORTS ANNOTATED.**—Comprising Recent Cases of General Value Decided in the Courts of the Several States on Points of Probate Law. With Extended Notes and References. By FRANK S. RICE, Esq. Author of "Civil and Criminal Evidence," "Law of Real Property," and "American Probate Law." Vol. 1. Baker, Voorhis & Co., New York: 1897. pp. 765 and xxiv. Price, \$5.50, or \$5.75 delivered.

This is a new series of Probate Reports in continuation of the series heretofore published by the publishers of the new series. The plan of this series differs materially from that of previous publications. The cases reported are selected with a view to giving those only that are important, and excluding those that merely decide well known and undisputed principles. Only one volume a year is to be published, and consequently much care is required in the selection of cases to be republished. Many of the cases are taken from the Reporters of the West Publishing Company in advance of the official reports. Dissenting opinions are also published.

The annotations are the most marked feature of this new series of reports. We find that in the volume now in hand, there are in all about one hundred and thirty pages of annotations by the editor. The notes are upon a great variety of subjects. The following list of the subjects treated, with the length

of the note upon each, will serve to show the extent and scope of the editor's work:—

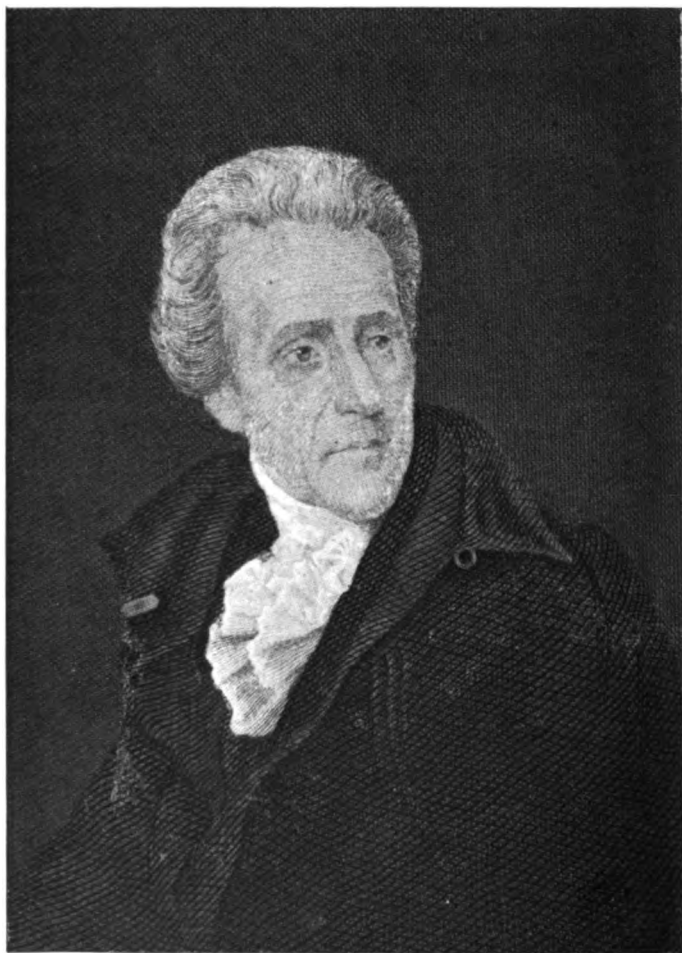
Ancillary Administration, 1 p.	Pedigree, 3 pp.
Collateral Inheritance Tax, 3 pp.	Liabilities of Executors for Attorney's Fees, 2 pp.
Accounting of Executor or Administrator, 3 pp.	Gifts and Advancements, 2 pp.
Common Law System Examined, 3 pp.	Jointure and Its Incidents, 4 pp.
Devise upon Condition, 2 pp.	Jurisdiction of Probate Courts, 6 pp.
Advancements, 2 pp.	Latent Ambiguity, 5 pp.
Ancestral Property, 1 p.	Conditions in Restraint of Marriage, 1 p.
Community Property, 3 pp.	Continuance of Business by Surviving Partners, 1 p.
Construction of Wills, 5 pp.	Doctrine of Perpetuities, 6 pp.
Equitable Conversion, 4 pp.	Rule in Shelley's Case, 5 pp.
Doctrine of Cy Pres, 6 pp.	Monomania as Affecting Testamentary Capacity, 4 pp.
Heirs of the Half-blood, 1 p.	Title by Escheat, 1 p.
Depositions in Evidence, 7 pp.	Title by Prescription, 5 pp.
Executory Devises, 6 pp.	Investments of Trustees, 1 p.
Drunkenness as Affecting Testamentary Capacity, 1 p.	Implied Trusts, 1 p.
Doctrine of Election, 4 pp.	Undue Influence, 4 pp.
Estates in Remainder, 6 pp.	Excessive Damages, 2 pp.
Estates in Tail, 5 pp.	Impeachment of Witnesses, 3 pp.
Exceptions to the Admission of Evidence, 3 pp.	Non-professional Witnesses, 1 p.
Sale by Executors and Administrators, 3 pp.	Bastards: Subsequent Marriage of Parents, 1 p.
Charitable Trusts, 9 pp.	

The annotations seem to be adequate, and as full as could be desired. They seem generally to have been made with ease. We notice, however, a misuse of the term *Prescription* which the annotator uses as equivalent to the term *Adverse Possession* in his note entitled *Title by Prescription — Adverse Possession*, which treats of adverse possession wholly. He does not state what prescription is, or that it is properly used solely with reference to incorporeal rights; though he says the term "is most frequently applied to easements. But in popular parlance, it has been quite generally confounded with title by adverse possession." A legal author should write with legal accuracy and not confound terms by adopting "popular parlance."

We think this series of Probate Reports promises to be a very useful and valuable one.







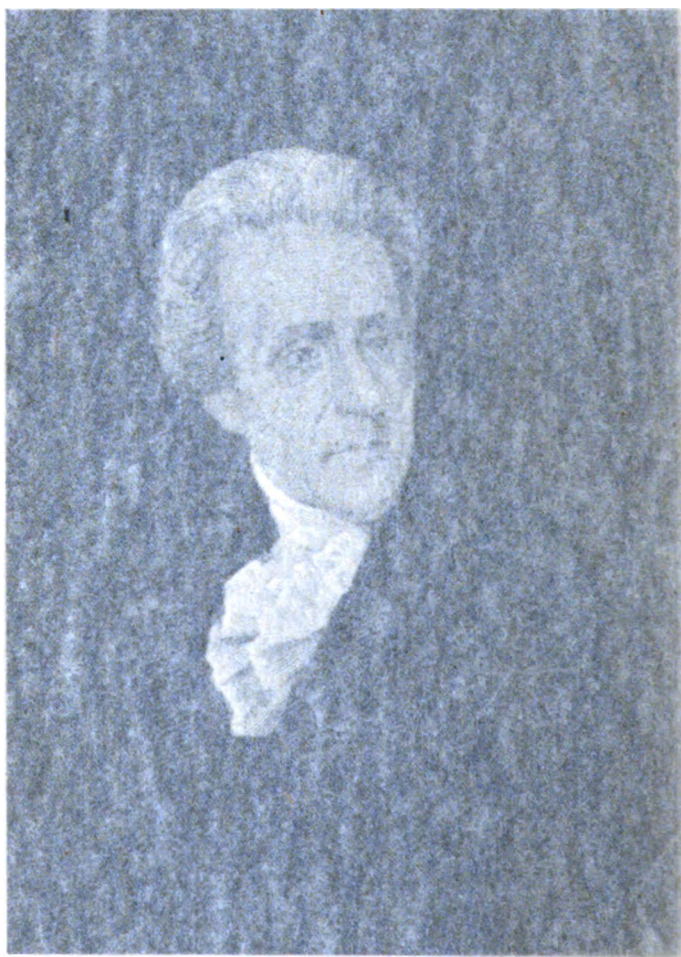
**JUSTICE ANDREW JACKSON.**

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[illegible]

"Strong, without rage; without fear or anger."

VOL. XLXI.



JUSTICE ANDREW JACKSON

# THE AMERICAN LAW REVIEW.

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SEPTEMBER-OCTOBER, 1897.

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## MR. JUSTICE JACKSON.<sup>1</sup>

Near this city sleeps all that is mortal of Howell E. Jackson, a lawyer, a statesman and a judge, but recently among us and personally known to most of those within the sound of my voice. As a lawyer, he was studious, careful and accurate. As a statesman, he was incorruptible, moderate and just. As a judge, he was laborious, impartial, patient and urbane. As a man, he was a character to be envied, and a model to be imitated. Possessed of that unaffected gentility which is the result of a mingling of self-respect with respect and kindness for others; always self-restrained; never giving nor unduly resenting offense. Not a prodigy; not a genius; not possessed of those commanding powers which in other men make leadership and sway so easy; but amply endowed, and making the best use of the powers he had. Not a religious fanatic, but a firm and consistent Christian. Not a moral enthusiast, but a moral example. A character abounding in lines of beauty, and showing scarcely a blemish or defect. Nowhere exaggerated, but everywhere strong. No extraordinary development in any direction, but everywhere well filled out:—

“Strong, without rage; without o’erflowing, full.”

<sup>1</sup> Part of an address delivered before the Tennessee Bar Association at Nashville, July 29, 1897, by Seymour D. Thompson, of Missouri.

In his ending there was a touch of martyrdom. Knowing that he was stricken with a mortal disease, he returned to his post of duty, and there, with the hand of death upon him, as the last act of his official life, he took part in the decision of a great constitutional question which, in his absence, had failed of decision by reason of an equally divided court. He has gone from among us, leaving behind a beautiful memory and the record of a life which furnishes the best model for our sons. We can not say that "we ne'er shall look upon his like again." It is the characteristic of the great and noble profession to which he belonged, in the processes of human evolution, to produce such men. We that are here assembled may not, perhaps, look upon his like again; but some future generation will; though few such men will rise to enlighten, to guide, to instruct, and to bless mankind.

But it is not of this Justice Jackson that I am here to speak to-day; it is of another Justice Jackson, whose ashes likewise repose near this city: **2. Justice Andrew Jackson.** a mightier force, a haughtier name; a man who left a far deeper trace upon the history of his country; who found that country sunk in the depths of shame, and lifted it up and placed it upon the heights of glory. I mean **ANDREW JACKSON**, for six years a justice of the Superior Court of Tennessee, then your court of highest jurisdiction, corresponding to your present Supreme Court. Speaking to the legal profession of Tennessee, here assembled in annual convention, at the time and place of a great exposition of the arts, the sciences, and the industries of peace, gathered together to commemorate the Centennial Anniversary of the admission of this State into the Union, it is altogether fitting that I should choose for my theme a member of that profession whose name is signed to the first Constitution of Tennessee; who, in territorial times, had been its Attorney-General; who was its first Representative in Congress; who was one of its first Senators in that body; who was a judge of its highest court of judicature; who was a Major-General of its militia; until finally, in his office of Major-General of the armies of the United States, he lost his distinctive character as a citizen of Tennessee and became a citizen of the whole

Union, twice elected to the supreme magistracy — admired by all, applauded by all, claimed by all: second only to the Father of his Country.

Rising by inherent merit from the humblest beginning to the most exalted station, only the free institutions of America could afford room for such phenomenal development. Let us

**3. Childhood and Youth of Andrew Jackson.**

trace that growth and discover in it the most exalted tribute that can be paid to those institutions. Starting from the lonely rock of Carrickfergus, in the North of Ireland, we see an humble couple of that hardy Scotch-Irish stock<sup>1</sup> set sail, in the steerage of an emigrant ship, for one of the British colonies in America. We see that faithful and courageous pair struggling to found a home in the wilderness. Depict their struggles if you can, you that have not been through them, as I have. We see children born unto them, with scarcely a roof over their heads or clothing to cover their nakedness. We see the father finally dying, a landless backwoodsman, and the poor mother left to face the world alone in a wilderness, with a family of small children, one of them as yet unborn. While sheltered by the charitable roof of a relative, she gave birth to a boy; and thus was ushered into the world Andrew Jackson, a half-orphan and an object of charity, but destined to “fill the measure of his country’s glory.” Let us follow him as he grows up in the wilderness. Not pampered in the luxuries of dainty food, fine clothes, or a soft bed. His staple food, corn bread and bacon — to my taste nothing better — with an occasional haunch of venison, a steak of bear-meat, a fish from the running stream, or a dish of jowl and greens, thrown in as a luxury. His garments of the plainest homespun, with the possible exception of the coon-skin cap. Tow-cloth the staple; woollen a luxury. His bed a tick of straw, or more likely of corn shucks, laid upon flat supports consisting of strips rived out of logs of wood, called in the North “shakes” and in the South “clap-boards.” Or possibly his bed may have been superimposed on the more pretentious structure of ropes stretched across each other, at right angles,

<sup>1</sup> See note A, at end of this article.

through holes bored in the side and end pieces of the bedstead. His waking hours were spent in the open air. He early made the acquaintance of those inseparable aids to the toils and sports of the Southern boy, the gun and the horse. The Indian was on the frontier, the British were on the coast, game was around him in the woods; and he lived on horseback, gun in hand. It is, perhaps, not creditable to our American literature that neither the backwoodsman nor the backwoods boy has been adequately described in any American poem. It remained for an Englishman, a titled aristocrat at that, but one whose heart beat to the tune of liberty,—the greatest of English poets,—to describe him:—

“ And tall, and strong, and swift of foot were they,  
Beyond the dwarfing city's pale abortions,  
Because their thoughts had never been the prey  
Of care or gain; the green woods were their portions;  
No sinking spirits told them they grew gray;  
No fashion made them apes of her distortions;  
Simple they were, not savage; and their rifles,  
Though very true, were not yet used for trifles.

“ Motion was in their days, rest in their slumbers,  
And cheerfulness the handmaid of their toil;  
Nor yet too many, nor too few their numbers;  
Corruption could not make their hearts her soil;  
The lust which stings, the splendor which encumbers,  
With the free foresters divide no spoil;  
Serene, not sullen, were the solitudes  
Of this unsighing people of the woods.”

So much for nature's nobleman. Is it a wonder, then, that, when the Revolutionary War invaded the Waxhaw settlements, when Tarleton's horse and Lord Rawdon's infantry came with bullet, halter, fire and brand, leaving in their wake ashes, famine, disease, and fresh-made graves, we see the Jackson brothers mount their horses, shoulder their guns, and take the field in a company of partisan rangers? Young Andrew Jackson, but fourteen years of age, throws his boy's life, with all its tender hopes and emotions, into the scale, and thinks it but a poor sacrifice to make for his bleeding country. The vicissitudes of war make him a prisoner. We remember the story of his refusal to black the boots of a British officer, of his demand to be treated

as a prisoner of war, and of the stinging blow laid on his arm and head with the edge of a sword, the scars of which he carried to his grave. We, who know his proud, resentful nature, know the deep, ineradicable hate kindled by that blow. Like Mazeppa, he "paid it well in after days."

"For time at last sets all things even;  
And if we do but watch the hour,  
There never yet was human power  
Which could evade, if unforgiven,  
The patient search and vigil long,  
Of him who treasures up a wrong."

He paid it when he hustled the British out of Pensacola; he paid it when the flower of British chivalry and valor went down before his rifles at New Orleans; he paid it when he put to death Arbuthnot and Ambrister for giving succor to the Seminole Indians.

We see him next with his brother in a British hospital prison. While there they are both stricken with that dreadful disease, small-pox; and their heroic mother secures their release and brings them home, the elder to die, the younger to carry to his grave the marks of his sojourn in a loathsome British prison. Next we see that same heroic mother make a long journey to Charleston to succor other patriots, there languishing in British prison ships; and we see her, while so engaged, sink and die; and we leave her buried in an unknown grave.

Now, young Andrew, at the age of fifteen, is orphaned quite. He has drained the cup of life's bitterness to its last dregs. He is now in the world alone. No; not quite alone, There still live in the Waxhaw settlements kinsmen and friends through whose partiality he is able to pick up, in a private school — for there were no public schools in those days — some of the rudiments of an English education. I say some; for he never learned either to spell correctly or to write the English language grammatically, and these deficiencies of education marred his public efforts to his grave. But what of that? He could not spell: neither could Cromwell; neither could Washington; neither could Napoleon. And yet Cromwell won every battle that he fought, dethroned a king, destroyed a parliament, and finally



“hewed the throne down to a block.” And yet Washington freed his country and refused a throne; and Napoleon rode on horseback all over Europe, tearing down and setting up kings, and “shaking them from their slumbers on the throne.”

With this scant mental equipment, Andrew Jackson began, at the age of eighteen, the study of law in the office of a lawyer in a rural village. At the age of twenty, and, we may note,

**4. Andrew  
Becomes a Lawyer.**

before attaining his majority, he was admitted to the bar — such was the careless temper of those times. Now he turns his face to the West. Mounted on a horse, with a lawyer's license, and, possibly, a law book or two, he crosses the mountains, follows the Robertson Trail, eludes the lurking Indians, and finally arrives at what was then a collection of log houses, but what is now this beautiful and prosperous city. The settlers were in a state of constant warfare with the Indians. No one ventured out without being armed, and every man slept with his rifle by his side, like a soldier expecting a night attack. It is said that, on an average, one white person belonging to the Nashville settlement was killed every week in the course of the year. In a state of perpetual war with lurking savages, the white man himself grew savage; and the savage element in the nature of our hero may, in a measure, be traced to the natural growth and development superinduced by such surroundings; and this must be our apology for it, if it needs apology. And now, at the age of twenty-one, he contrived to obtain the office of State Solicitor, as it was then and still is called in North Carolina, which office was afterwards, when Washington County, North Carolina, became the Southwestern Territory called by the name of Attorney-General, a name which it still carries in this State. For about seven years he filled this office, first under an appointment from the public authorities of the State of North Carolina;<sup>1</sup> next, after the cession by the State of North Carolina to the United States of the territory which forms the State of Tennessee, under an appointment from President Washington. Mingled with the respect-

<sup>1</sup> See note B, at the end of this article.

able people who constitute the mass of the settlers of every new country, there is always a large disorderly element. It was so in this case. Mingled with the decent and law-abiding people, and to them a terror and a scourge, were outlaws, fugitives from justice, insolvent debtors, thieves, robbers and murderers. Facing this desperate crew of law-opposers and law-breakers, stood young Andrew Jackson, a boy who had barely attained his majority, as the representative of organized society, the head of the forces of law and order, the man whose duty it was to make the first move in every criminal prosecution, and to put the law in force against every malefactor. We know that, during the seven years in which he stood at the head of the marshaled forces of law and order, there was scarcely a day or an hour in which his life was not in peril. At every court meeting; at every lonely angle in a woodland bridle path; in every tavern brawl which might be hatched up for an occasion,—some desperate criminal whom he had prosecuted, successfully or unsuccessfully, was waiting for an opportunity to get even with him. No man ever sustained a calling so perilous with a more superb courage. In the constant presence of danger and of death, he became educated into that contempt of danger which made him greatest where the danger was greatest; which gave him the best possession and use of his faculties in a sudden surprise, as at Emuckfau; which enabled him to face, single-handed, a whole regiment in angry mutiny; and which impelled him to the night attack which so astonished the British at New Orleans. Thus educated, it came to be true of Andrew Jackson that, in the presence of sudden danger, no matter how extreme, he never seemed to feel the slightest tinge of fear; but he rose to a state of mental exaltation; no opponent could withstand the frenzy of his eye; his action was immediate and decisive, and always the best action that could be taken.

Born of Scotch-Irish stock, Jackson was in one respect an

**5. The Fighting  
Practitioner.**

Irishman. A learned and somewhat eccentric Irishman, who formerly lived in Memphis, wrote a treatise to prove that the Irish were descended from the ancient Greeks; and among other arguments which he adduced to prove his hypothesis was this,—

“that, like the ancient Greek, an Irishman is never at peace except when he is at war.” A hundred years ago, in the practice of the law in Ireland, if we may believe credible accounts, it was the constant practice to settle the issues joined in pleadings upon the field of honor. There were not only nice distinctions as to rejoinders and surrejoinders, rebutters and surrebutters, but also as to the lie direct, the lie circumstantial, and the amende honorable. A genteel acquaintance with hair-triggers was almost indispensable to success at the bar; and the refinements of the Code were as much a part of the legal curriculum as Coke and Blackstone. It has been said that the only defensive pleading which a timid attorney dared to file was a demurrer: *that* admitted the *truth* of the pleading demurred to. It seems to have been somewhat so in the early days in Tennessee. We all recall how, goaded by sarcastic language used in reply to his argument, young Andrew Jackson hastily tore a blank leaf out of a law book and on it wrote a challenge to his opponent, Col. Avery; how they met and fought and missed each other; how each was satisfied; how they shook hands and again became good friends. We all recall how the “lodged hate and certain loathing” which grew up between Jackson and Dickinson were aggravated by the frequent rencounters of these high-mettled men in the court room; they being leaders of the early bar of Nashville, and generally on opposing sides of every litigation. We regret that the character of duelist, and even that of participant in street broils, mars the fame of one of America’s greatest men. But he must be judged by his times. We do better nowadays, even here in the South. The commercial spirit has taken hold of us, and with it the Christian spirit. “The jingling of the guinea helps the hurt that Honor feels;” and the spirit of Christ calls upon us to exercise self-restraint and obedience to law. The Duke of Wellington said that the thing which required the most courage in a general was to give an order to retreat; and we know, in our heart of hearts, that it often requires more courage to decline than to accept a challenge. Nor was the ancient system of dueling among members of the bar without some compensations. It held lawyers, in the practice of their profession, to the strict

principles of honor. It prevented trickery and shysterism; it meant that when a lawyer passed his word he would keep it. While it was sometimes availed of by bullies to overawe timid opponents, yet as a general rule, a man could avoid personal danger and keep out of difficulties, by acting honorably and telling the truth.

But there was a softer and a happier side to the life of ye lawyer of ye olden time. It was not all  
 6. Ye Lawyer of ye Olden Time. strife, and broil and danger. The lawyers met the judge at the village tavern, and rode with him on the long horseback journeys from one county seat to another. Their intercourse was cordial and unrestrained. Their books were limited to the statutes and to those horn-books that could be crammed into the saddlebags. If the ancient lawyer had few books, the modern one has too many. If the ancient lawyer read little, he thought much: his modern descendant must read so much that he has no time to think. The many books of the modern lawyer look like a division of troops with uniforms clean and new and with muskets and bayonets furbished, all carefully aligned and paraded for inspection and review; the few books of the ancient lawyer looked like some of Jackson's Indian fighters, ragged and worn with war and toil and use. In those days judicial precedents did not have so much force, but natural justice was reached quite as often. The doctrine of *stare decisis* must have had a feeble hold were there were no books. The difficulties which attended a court of appeal even in following its own decisions, are plaintively portrayed in one of Judge Peck's dissenting opinions, where, after depicting the difficulties under which justice was administered in the Supreme Court of this State in the early wilderness, he added almost pathetically, "and at Reynoldsburg without books."<sup>1</sup> Where now is Reynoldsburg?

<sup>1</sup> Among the old Carolina statutes applied to Tennessee, which does not appear to have been repealed down to Jackson's time, was this: Act of March 17, 1748, required county judges to provide and keep, as the property of the county courts, the

following books: Cary's Abridgment, of Statutes; Godolphin's Orphan's Legacy; Jacob's Law Dictionary; Nelson's Justice; Swinburne on Wills; Wood's Institute. I note this old statute, in passing, not that I suppose it to have any relation to the matter

The country lawyer of ye olden time was generally courteous to the court and to his brethren of the bar; but in the cross-examination of a witness whom he thought was lying, he was as merciless as a panther; and rarely did a perjurer leave the box until court and jury were convinced of his guilt. He was not over-dainty as to dress or food, but was particular about one thing: that no limit of time be put upon his speech to the jury. He was like an old lawyer friend of mine in Missouri who was never known to mention the points of his argument, but summed it all up in the self-satisfied statement, "Eh Gad, Sir, I spoke to the jury seven solid hours!" To "get the jury" was the summit of his professional ambition; for there was the test of his power, and there he was in his glory. So he loved to try a case mainly because, at the close of the evidence, he could make a speech. His next passion was a quiet game of poker with a big-bellied whisky bottle called "Black Betty" in the center of the table. As there were but few law books to study, he had become an adept in weighing jurors, witnesses and opposing counsel; so there was nothing to do, after court adjourned in the evening, but to toy with cards and bottle at the tavern. In the early years of the republic, the people had more respect for courts and lawyers than now. Then they attended courts in droves, and, bringing provisions for man and beast, they camped in and around the county seat for days. They listened with breathless interest to the evidence in every trial, and from the arguments to the jury drew a goodly share of their meager education. The man that made the best speech was to them the best lawyer.

The ancient country lawyer was always half politician, and from the day he first read Blackstone until death claimed him, he lived in the hope that his country would call him to a position of power, dignity, honor and glory; and often it did. His method of impressing his superiority upon the people was through the jury. There he was at home, as is the eagle among the crags and the clouds. Conscious of his power, firmly believing his client in

in hand, but merely as a curious piece of early legislation — tending to show what was supposed, at that date, to

make up the working "kit" of a judge of a subordinate court of record. Haywood's Revision, page 58.

the right, he stood before the jury the incarnation of dignity, virtue and righteousness. Clearing his throat, in slow, deliberate monotone, he commenced his argument — “Gentlemen-of-the-jury.” Gradually warming up to his subject, he took off his stock and unbuttoned his collar; then his coat and vest were laid aside, and then for hours he indulged in his loftiest flights of wit, wisdom, pathos, sarcasm, invective and illustration. All the arts, tools, tricks and skill of the advocate were his. He could coo like the sucking dove, or roar like the lion; but in pleading for the rights of woman, his voice was as low and soft and sweet and tremulous as the summer breeze. In his criticism and ridicule of the arguments of “the distinguished counsel on the other side,” his sneering face was in itself a breach of the peace. In his denunciation of the opposing party and witnesses, he lashed himself into a fury, and swept through fact and argument like a cyclone through a forest; his big voice grew into a roar, and to the gaping listeners he appeared as terrible as an army with banners. Yet when the verdict came in and court adjourned, with the judge between them, the two opposing lawyers slowly wended their way to the tavern, where the first thing they did was to pay their respects to the contents of “Black Betty.” It ought to be added that if ye lawyer of ye olden time lost a case through an adverse ruling of the court, he, like his modern brother, still found himself possessed of two remedies, both of which he generally pursued: one was to take an appeal; the other was to go down to the tavern and cuss the Judge.

I have said that the name of Andrew Jackson is signed to the first constitution of Tennessee. That instrument dates from the year 1796. Jackson was consequently but twenty-nine years of age when he signed it. He was one of the five delegates to the Constitutional Convention from Davidson County. The fact, that at that early age, he was selected to fill so important an office, is not his least title to distinction. When the new State was first ushered into the Union, he was elected to the seat of its first representative in Congress. After attending a session of Congress at Philadelphia, he resigned the

7. Andrew Jackson,  
a Judge of the  
Superior Court.

office and returned to Tennessee to take up the frazzled threads of his private affairs. Soon afterwards Gen. Cocke resigned his seat in the Senate of the United States from Tennessee, and Mr. Jackson was appointed in his stead. Again he turned his face toward the Northeast, proceeded on horseback to Philadelphia, and served as a senator during another session of Congress. He was thus a member of the House at the age of twenty-nine and a senator at the age of thirty. He was barely of sufficient age to be eligible to the latter office. This office he in turn resigned, and returned to Tennessee in June, 1798, to find that Hon. Howell Tatum had resigned the office of Judge of the Superior Court of Law and Equity. To this office Jackson was immediately appointed, and he filled it until June, 1804, a period of six years, when he resigned it, and was succeeded by John Overton.

The court to which he was thus elevated was created by the first legislature of the State of Tennessee, under the authorization of the new constitution. It was composed of three judges, any one or more of whom might hold any court. The territorial legislature had, two years before, organized a judicial system composed of a superior court and a number of inferior courts. I do not gather from the constitution or statutory provisions relating to the Superior Court created by the legislature under the new constitution, that it was anything more than a court of *nisi prius*. It had power to issue writs of certiorari; but I find no provision for writs of error or appeals, nor any provision for the meeting of the judges *in banc* to hear appeals from courts composed of single judges, or cases reserved by such courts. It will be recalled that the early Superior Court of Georgia was organized in the same way; though the judges of that court early began, from the necessity of the case, and without any statutory authorization, to meet *in banc* to decide important cases reserved for that purpose; and this was doubtless the plan of judicial organization of other States at an early period.

Of the judicial work of Mr. Justice Jackson, no printed memorial has come down to us. A few of the decisions in Overton's reports, subsequently compiled and published, partly on the recommendation of ex-Judge Jackson, may have been ren-

dered while he sat as a judge of the court; but they are all *per curiam* opinions. All of the reported cases in the decision of which he may have participated, will be found in 1 Overton, from pages 3 to 17, and in 2 Overton, page 1.<sup>1</sup>

The decisions which are collected in these two volumes, which I have cited by the name of Overton, but which are generally cited by the name of 1 and 2 Tennessee, are tersely but clearly reported. They exhibit commendable independence of thought, and a just disposition to adapt the common law of England to the new situation and surroundings. They afford a rare mingling of common sense with legal sense. They have always been held in high esteem by the profession, and deservedly so.

Of Jackson's character as a judge we know as little from tradition as from print. It is said that when presiding he wore a gown; if so, it indicates a proper appreciation of the dignity of his office. But it is to be said that there was then a greater disposition to imitate English habits and customs than there has been since the war of 1812. Some of those habits and customs might well be resumed. The judges of our appellate courts ought to be enrobed. The members of the bar and the auditors ought to rise spontaneously when the judges come into court to take their seats. The bar, standing, ought to bow to the judges, and the judges ought to bow to the bar, as they do in France.<sup>2</sup>

<sup>1</sup> These cases were: *Hoggart v. McCrary*; bill in equity to settle disputed boundaries; issue framed and tried by a jury. *Green v. Emmerson*, 1 Overton, 13; trespass for the accidental killing of a slave; submitted to the jury against the objection of the defendant that the remedy was case and not trespass, the court saying that the distinction between these two remedies was often a nice one. *Kerr v. Porter*, 1 Overton, 15; bill in equity to set aside a grant of land made by the State of North Carolina. The court refused to hear evidence of alterations and erasures in the entry book of the Surveyor-General, and refused to go behind the grant and to hear evidence

that the grantee had not rendered the services to the State of North Carolina which entitled him to make the entry. *Sweetman v. Wilbur*, 2 Overton, 1. This was an action of ejectment. The court refused to issue an attachment for contempt against the defendant because of his refusal to confess lease, entry and ouster, on the ground that no such process had been used in this State, and that the use of it might affect the liberty of the citizen.

<sup>2</sup> While this is the French custom, we address our judges as "Your Honor," and the French advocate addresses the President of the Court as plain "Monsieur."



And when the proclamation of the opening of the court has been made, the presiding judge ought to invite the bar to be seated before the business of the court is proceeded with. Instead of that, the judges enter the court dressed in all sorts of ways, and often not neatly or well dressed. The members of the bar, dressed equally badly, pay no attention to the judges when they come in. Some are standing with their backs toward the bench, and do not turn round. Some are sitting with their legs over the arms of their chairs; and some even salute the bench with the soles of their shoes, poised on the counsel table. This is too much democracy even for democratic institutions.

While we know little of the actual work of Jackson as a judge, of his character as a judge we can, from our knowledge of his character as developed in his subsequent career, form a safe conclusion. In three characteristics he surpassed almost all other men: 1. A love of justice and a corresponding hatred of wrong. 2. An absolute courage and a total want of fear. 3. An outspoken frankness which was a stranger to all guile. Added to this, his faculties were intuitively quick, and his temper was hot and rash. His honesty was so intense that it amounted to prejudice, for prejudice is nothing but intensified honesty. We must then regard him as a judge who saw the justice of a case at a flash, as soon as the facts were stated to him. From that moment he ceased to be a judge, and, losing all further receptivity, he became an advocate, but an advocate for justice and right — an advocate for the weak against the strong. If the jury went wrong, away went their verdict. It took thirteen men to commit a wrong of that kind in his court. It was impossible for him to be neutral. It was said of him in after years that he never had been neutral, even in a dog fight; but he had this good quality, that he always took sides with the under dog: Jackson rebelled against tyranny and oppression, and took sides with the poor and oppressed. He was not like some of our modern judges, whose intellects are completely hoodooed whenever a rich suitor, or a powerful corporation, or an aggrandized trust, stalks into his court in the person of eminent counsel. We may be sure that he did not regard his court as the mere bulwark of the Sacred Rich: the scattered and segregated masses

claimed some share of his thoughts and had some rights. And while he was a terror to evil-doers, he was the shield and defense of the righteous. I know of but one living judge who fills my ideal of the judge that Andrew Jackson must have been: Henry Clay Caldwell, the presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Jackson resigned the office of judge of the Superior Court to accept an office for which his talents and temper much better fitted him, that of Major-General of the State militia. **8. Jackson the Militia General, Planter, Merchant, etc.**

The State was divided into three military divisions, which seem to have corresponded with its judicial districts, and Jackson was elected by the legislature<sup>1</sup> to be the Major-General of the Mero District. His opponent was Governor Sevier, a revolutionary officer, the hero of the battle of King's Mountain, and a participant in no less than thirty-five battles and skirmishes. Jackson was elected over him by a majority of one vote. His career was now uneventful until Aaron Burr brought him into notoriety. He pursued the calling of a merchant, a general trader, a planter and a breeder of fine horses. Burr was a friend of Tennessee and an advocate of its admission into the Union. He was very popular in this State. He had been the guest of Jackson at the Hermitage. Jackson and his business partner built the boats on which Burr floated his celebrated expedition down the Mississippi river. When the scheme of Burr exploded and President Jefferson issued his proclamation denouncing him as a traitor, Jackson at once tendered to the President the services of his military division, and the tender was accepted. With great energy he assembled a regiment, only to find that their services were not needed,—an officer of the regular army stationed at the mouth of the Cumberland having reported that Burr's expedition had merely a mercantile, and not a warlike appearance. When Burr was prosecuted for treason in the United States Circuit Court at Richmond, before Chief Justice Marshall, Jackson was summoned as a witness and went. By this time he had become

<sup>1</sup> See note C, at end of this article.

convinced of Burr's innocence, and, as he never could be neutral or half-neutral, he espoused the cause of Burr openly and violently, and denounced Jefferson as a persecutor. He was never called to testify as a witness; but it is possible that the days and weeks which he spent attending upon the United States court at Richmond and listening to the incidents of the trial, gave him some of the ideas which filled the thoughts of Jefferson, on the manifest tendency of the Federal judiciary to override and superintend all other departments of the government. For he saw the chief justice coolly issue a subpoena *duces tecum* to the President of the United States, commanding him to produce a document, to wit, a letter written to the President concerning the Burr conspiracy, by Gen. Wilkinson, in command of a military division of the United States. And although Jackson deemed Jefferson a persecutor, he must have taken satisfaction in noting that the President never made any return to the impudent writ, but merely lodged the required document with the attorney of the government at Richmond, and left it to his discretion to determine to what extent he would permit its contents to be disclosed in court. If Marshall's pretension had been well founded, the President of the United States stood in contempt of his court, and might have been arrested and dragged from the executive mansion down to Richmond, and there imprisoned until he should comply with the order, or otherwise purge himself of the contempt. Think of it: The President of the United States in jail for contempt! In after days, as we shall see, Jackson himself came in contact with this same chief justice, and came off, as he always did, victorious.

It was not until the year 1812 that Jackson had occasion to marshal his Tennessee militia on the theater of war. Then, war having been declared against Great Britain, he assembled and equipped a regiment of them and floated them down the Mississippi to Natchez, only to learn from the misinformed, incompetent and imbecile administration at Washington, that their services were not needed and that he should disband them. He refused to disband them 450 miles from their homes; to that extent he disobeyed the orders of the Secretary of War; he regarded it as his paternal duty to bring them back to the spot

where he had assembled them and to disband them there. Raising supplies for the march on his own personal credit, he marched them back and disbanded them at Nashville. In that expedition Jackson everywhere showed the qualities of a military leader, and if his military career had stopped there, his reputation as a soldier, at least in Tennessee, would have been secure.

When the Revolutionary War broke out George III. laid before his Council a memorial, in his own handwriting, advising the employment of the red Indians against his rebellious subjects

**9. Jackson the Hero  
of the Creek War.**

in North America. They were employed, and they massacred patriots and loyalists without discrimination. If George III. could have fallen into their hands and could have been tied to a stake, his body stuck full of pine knots, and then burned to ashes, it would have been no more than retributive justice. When the war of 1812 broke out, this infamous policy was repeated by the British government. Agents of that government made treaties with the Indian tribes on our frontiers, and, through the aid of that able chief Tecumseh, incited an Indian uprising which extended from the Lakes to the Gulf, and which filled our frontier settlements with fire and massacre. The massacre of Fort Mims, in the Alabama Territory, where 500 men, women and children, soldiers and civilians alike, were put to death by the Creek Indians under the leadership of the half-breed Weathersford, roused the people of the Southwest to a pitch of frenzy. Jackson took the field at the head of his Tennessee militia and volunteers. The campaigns which he prosecuted against the Creeks are unsurpassed in the annals of heroism. Arousing the patriotism of his faltering and suffering soldiers by his military addresses, which were equal to those of Napoleon; facing, single and alone, a whole regiment of soldiers in mutiny, who, misunderstanding their term of enlistment, were bent on returning to their homes, and announcing that he would kill the first man that took a step toward the North; by a single letter recalling the timid and wavering Governor of Tennessee to his duty, so that he ordered new levies and sent them forward; refusing to desert his post in the Indian country when his army had dwindled to 150 men; announcing in every letter his full

determination to die rather than turn his back upon the savage foe, and possessed of the most absolute purpose so to do; rallying his little army when attacked, while retreating, by an unknown force of savages in ambush, and signally defeating them; overthrowing them in three pitched battles,— the last, where he found them on their “ Holy Ground,” behind fortifications which they had been instructed to erect by British officers — a whole days battle in a jungle, in a bend of the Tallapoosa river, neither side asking or giving quarter; the Indians firing upon the very men that were sent to offer them terms of surrender; the carnage not ending till all, save a few that found means to escape, had sunk into the earth. Soon after came a scene which, so far as I know, has but one parallel in history. You will detect the parallel in the act of Vercingetorix, the Gallic chieftain, surrendering to Julius Cæsar, and thus sacrificing himself to save his people. Weathersford rode majestically to the tent of Jackson himself, dismounted and informed the general who he was. His warriors were all slain: Jackson had blotted them from the face of the earth. His women and children were starving in the woods. He asked nothing for himself. He was ready to do and suffer whatever sentence should be imposed upon him; but he came to plead for the helpless women and children left in his charge. Jackson, convinced that Weathersford had done all he could to prevent the massacre of non-combatants at Fort Mims, determined to protect him and treat him as a prisoner of war. He defended him against the fury of his own soldiers at great personal risk, and when an opportune time arrived he found means to send him beyond his lines. Vercingetorix languished eight years in the Mamertine dungeons in Rome, and was then put to death like a common felon; Weathersford was suffered to return to peaceful pursuits and to live and die a well-to-do and respectable planter.

It was my chief purpose to speak of Jackson as a lawyer and a judge, and to vindicate his conduct in those cases where he came in hostile contact with lawyers and judges. But it would be unpardonable, even before a convention of lawyers, if I should omit all allusion to the glorious chapter of New Orleans.

10. Jackson at New Orleans.

William Henry Harrison, disgusted, as he well might be, with the conduct of the government at Washington, had resigned his commission as Major-General in the armies of the United States; and Andrew Jackson, without his solicitation, had been appointed in his stead, and ordered to take immediate measures to defend our Southern coasts, threatened with a formidable hostile expedition organizing in Jamaica. On a November day, having ridden, with two or three of his staff officers, across the country from Mobile, he entered New Orleans, then a polite and wealthy Creole city of 20,000 inhabitants. His uniform was worn, threadbare, and bespattered with mud; his face thin and yellow with disease; and the pits of the small-pox and the scar left by the gash of the British officer's sword were still visible. The famous Edward Livingstone, once mayor of the city of New York, was there, endeavoring to retrieve his bankrupt fortunes by the practice of the law. He became at once the adviser, interpreter, translator, literary expert, political agent, staff-officer, and general right-hand man of Jackson. He became the connecting link between Jackson and a people to whose language Jackson was an utter stranger. The General delivered an address to the people in English. They could not understand it, and it produced no effect whatever upon them. But when Livingstone translated it into the glowing imagery of France, their enthusiasm knew no bounds. Jackson thought that, "with the smiles of Providence," he would be able to defend the city. Mark you: he did not ask the *aid* of Providence; he only wanted Providence *to smile*; he would do the rest.

And now he was inspired. He lived almost without eating, for he could not eat. Yet the enormous mental activity which he displayed seemed to rival that of young Bonaparte in his palmiest campaign. He was five weeks from Washington, the seat of an almost imbecile government; it consequently took ten weeks to send a dispatch to the Secretary of War and to get a reply. The elements with which he had to deal were a few companies of regular troops; two unmanned vessels of war; a not very efficient territorial governor; a half-loyal legislature composed in the aggregate of as trifling a gang as ever assembled

in the midst of a great crisis; and a motley people of all races and nationalities. In this situation he saw that there was but one thing for him to do in order to defend the city,—to seize unto himself every element of power and success. Without authority from Washington, he declared martial law. He pressed into the ranks every man who could bear arms, and whom he could arm, including a company of friendly Choctaw Indians and a battalion of free negroes. He even accepted the services of the pirates of Barataria, and they became his most efficient artillerists. He did this on the advice of Livingstone, who, strange as it may seem, was their legal adviser! He knew that the British were organizing in the bay of Negril in Jamaica the most formidable expedition which they had ever launched upon our shores; but he did not know from what point of the coast they would make their descent upon the city. He took every possible precaution against surprise; but in spite of all he could do, they had camped nine miles below the city before he was apprised of their approach! This he learned at 11 o'clock in the morning. At 3 o'clock he sat on horseback by a mill on the batture, south-east of the city, and reviewed the various detachments of his little army, as they hurried past to take position in order of battle. He was going to attack the British, and not wait to be attacked by them. The British believed, from experience, that the Americans would never fight except on the defensive. Judge, then, of their surprise, when they were attacked in the night in Indian fashion. The battle raged for two hours until the fog became so thick that no one could distinguish friend from foe. Jackson, having learned that a fresh division had reinforced the British during the night, and that their army was now much superior to his own in numbers, retreated behind the Roderiguez canal, and began to throw up breastworks. It had been his purpose to renew the battle in the morning, but on further reflection he became convinced that he ought not to take any unnecessary risks. The Roderiguez canal extended at right angles with the Mississippi river from the river to a swamp. Jackson's line of breastworks grew with incredible speed, and the British commander had the fatuity to allow him to fortify unmolested. Two more divisions arrived from

the British fleet, but still the British general waited for the arrival of Major-General Sir Edward Pakenham, who was on his way from England with another division of 1,700 men. He was a distinguished soldier of the Peninsular wars, and brother-in-law of the Duke of Wellington. All this time, day and night, the war schooner "Caroline," anchored in the river opposite the British encampment, rained shot and shell upon it. At the same time a battalion of mounted riflemen of Gen. Coffee, and the dragoons from Mississippi under Major Hinds, harried the British outposts night after night, surprised their videttes, attacked their pickets, and gave them no rest. As there was a tacit understanding among the armies of Europe that when two armies, although hostile to each other, were encamped opposite each other, and no immediate movement was contemplated, the pickets should not molest each other, the British naturally thought that this proceeding on the part of the Americans was *very impolite*.

And now Pakenham has arrived and something must be done. The first thing is a reconnoissance in force, made substantially by his whole army, to find out the strength of Jackson's works. It assumes the character of a battle, and the British are driven off. Next, notwithstanding the vigilance of Jackson, Pakenham contrives to get up from his ships and to place in position in the night time, near the works of Jackson, no less than 30 pieces of heavy ordnance, protected — oh, fatal error! — by hogsheads of sugar, as if the British general actually thought that American sugar was so filled with sand as to make it suitable for that purpose. At ten in the morning, this formidable battery opened fire upon Jackson's works. In those works Jackson had but 12 pieces of various caliber, the largest an 18-pounder, and none of them manned by expert gunners, if we may except those which were in the hands of the Baratarian pirates. Most of them were manned by Jackson's Tennessee backwoodsmen. But a gun is a gun, and a cannon and a rifle differ principally in size. A man who from his childhood has been trained to point a rifle, can easily learn to point a cannon. And now in the thick of the morning fog Pakenham's batteries open fire at a range of not more than 1,000 yards upon the astonished Amer-



icans; and quickly Jackson's twelve pieces reply from different points along his line.

"Then one vast fire air, earth and stream embraced,  
Which rocked as 'twere beneath the mighty noises;  
While the whole rampart blazed like *Ætna*, when  
The restless Titan hiccoughs in his den."

To increase the uproar, a British shore battery engaged the battery of Commodore Patterson across the river.

The cotton bales with which Jackson had protected his gunners proved to be worse than useless, and were discarded. They were knocked aside by the British shot and set on fire by their shells. The hogsheads of sugar with which Pakenham had sought to protect his gunners were likewise useless; they were penetrated by Jackson's shot as though they had been empty casks. In the thick fog nothing could be seen from Jackson's lines save the flash of the British guns, and this was the only mark at which Jackson's artillerists could aim. After an hour and a half of this terrific action, the British batteries became silent, while Jackson's iron hail still showered. And now the mists cleared away, and revealed, where the British batteries had been planted, a mass of indistinguishable wreckage. Out of thirty heavy pieces of naval ordnance but five remained mounted and in position. The rest was a mass of *debris*. On the other hand, but three of Jackson's pieces had been disabled.

And now there remained but two things for Pakenham to do: either to cross the river and take the city from the west side, or else to storm the works of Jackson in front. Stung by the sarcastic language of Admiral Cochrane, who said he could take those works with two thousand marines, Pakenham determined upon the latter course. Whom the Gods design to destroy they first make mad. The schooner of war "*Caroline*" had been burned at its anchorage in the river by hot shot thrown by a battery erected by Pakenham; but eighteen guns put in position by Commodore Patterson on the west bank of the river poured shot and shell without interruption into the British camps and gave the invaders no rest. Now Pakenham determined to make a simultaneous assault upon Jackson's position in front, and upon his battery on the west side of the river. On the 7th

of January there were too many signs of preparation in the British camp to deceive Jackson; he knew that he was to be attacked in front. Twelve hundred Kentuckians under General Adair had arrived and were placed behind the breastworks in reserve. Another detachment of two or three hundred Kentuckians under Colonel Davis were sent across the river to protect the batteries on the west side. Pakenham had dug a canal from Bayou Cataline to the river, with almost incredible exertion, and had got some boats through it, and was able to send an expedition across the river to attack the American batteries there.

Such was the situation at the break of day on the morning of January 8th, 1815, a day which will live forever in the annals of our country. Colonel Thornton, of the British army, crossing the river in boats with a considerable force of men, proceeded to attack the western batteries. At 8 o'clock the firing of rockets gave the signal for a general attack by the British columns upon the works of Jackson in front.

Now let us pause for one moment and survey the contending forces. Who are those that come marching forward in well aligned masses, their red uniforms dimly seen through the morning mists? They are the veterans of the Duke of Wellington, commanded by veteran generals. On the Spanish Peninsula they have defeated the marshals of France in thirteen great battles. It still remains for them to "shake the spoiler down" upon the field of Waterloo. And who are those ununiformed and ragged men who stand behind the American ramparts firmly grasping their rifles and anxiously peering into the mists? A few companies of American regulars; two squads of pirates, striving to redeem their crimes by fighting for their country; some Louisiana militia, spirited but unaccustomed to fighting; a battalion of Mississippi horsemen, now dismounted; a battalion of free negroes. But, lining the works on the right side stand the Tennessee riflemen under Carroll; while on the extreme left, where an attempt to turn the flank is feared, stand the intrepid Indian fighters from Tennessee under Coffee. Behind all stand the Kentucky riflemen under Gen. Adair, in reserve. I call attention to the fact that they stand in reserve; because, through a

piece of doggerel verse which afterwards helped to elect Jackson to the Presidency, the glory of winning the battle of New Orleans was ascribed to them. You remember some of the lines:—

“He led us down to Cypress Swamp;  
The ground was low and mucky;  
There stood John Bull in martial pomp,  
And there was old Kentucky.

“Now Jackson he is wide awake;  
He is not scared at trifles;  
For well he knows what aim we take  
With our Kentucky rifles.”

And now for a simile that must have tickled the fancy of the ancient backwoodsman immeasurably. We are still surveying the rampart of Jackson and the little force defending it:—

“Behind it stood our little force,  
None wished it to be greater;  
For every man was half a horse,  
And half an alligator.”

The truth is that the Kentuckians were the only American troops that retreated on that day. The detachment sent across the river seem to have misbehaved. They failed to defend the batteries, and it became necessary to spike the guns and abandon them. Jackson, in his official report, said that they fled ingloriously. But they were exonerated by a court-martial. They do not seem to have deserved the most severe censure. The truth probably was that they were fresh militia, badly armed, unaccustomed to their officers and to each other, and that when assailed by the steady onset of the British veterans they could not stand their ground. Far otherwise the conduct of the Kentucky troops of Adair in the reserve behind the works of Jackson. They could not be kept in the reserve. They loaded their rifles and ran up to the breastworks and thrust themselves between Carroll's Tennesseans, picked their marks and fired, and then ran back to their positions to reload, again to run forward and fire. And now the British columns move grandly on, as if upon parade; and Pakenham himself rides near, encouraging his men. “On came his solid infantry, line marching after

line." And now they are within easy range of Jackson's guns. And now the cannon open upon them, and plough great gaps in their ranks. But the gaps quickly close, and the masses still press forward. And now the cannoniers load their pieces almost to the muzzle with musket balls, and their discharges make furrows through the advancing columns. And now the deer-hunters and the Indian fighters—the men with the shaggy beards and the coon-skin caps—obeying the command of Jackson to reserve their fire until they can see the white of the British soldiers' eyes,—open fire with their unerring rifles. Not a shot is wasted: no man fires except at his game. Pakenham, riding up and down his lines, is wounded in the right arm and it drops helpless by his side. He waves his hat with his left hand and leads his troops to the very margin of the canal in front of Jackson's works; but only to die as the fool dieth. His next in command, Major-General Gibbs, falls mortally wounded; and Major-General Keene, badly wounded, is taken from the field. Nearly all his mounted officers go down. His solid infantry falters, halts and is swept away. For twenty-five minutes the works of Jackson rain an uninterrupted storm of fire. At the end of this time where is the British army? One-third of that army—not one-third of the assaulting columns merely, but one-third of the whole British army, have sunk into the earth. At the end of that time all that remains of that splendid host, except its distant reserve, consists of dead and wounded covering the plain, and broken bands of fugitives hiding in ditches and skulking behind every irregularity of ground that can shield them from the murderous rifles of Jackson's frontiersmen. Nine thousand infantry assailed the works of Jackson. Forty-five hundred muskets and rifles defended them. Of these, not 2,500 were actually engaged. The British sustained a loss of 700 killed and 1,400 wounded; the Americans a loss of 6 killed and 8 wounded! A single comparison will show the extent of the British losses. The battle of Shiloh was fought on the soil of this State. From the beginning to the end of that battle the Federal generals deployed more than 60,000 men, and the Confederate generals more than 40,000 men. For at least 21 hours

these mighty hosts were hurled against each other in charges and counter-charges, sometimes in the woods and sometimes in the open fields. Yet the Federal loss in killed outright was but 1,728, and the Confederate loss in killed outright was nearly the same. But at the battle of New Orleans more than one-third that number of British died in front of Jackson's cannon and rifles in less than thirty minutes.

The rest is quickly told. Eight days afterwards the British army ingloriously retreated and floundered through the mud to their ships. The *Te Deum* was sung in the Cathedral of New Orleans. The city was saved from pillage and pollution; our country was lifted from the depths of shame to the heights of glory and renown; and a foreign invading army had set foot on our shores for the last time.

NOTE A. — Col. Colyar, of the Nashville bar, a gentleman whose authority on an historical question of this kind is entitled to much respect, maintains that Jackson's ancestors were not Scotch-Irishmen, but were simply Irishmen; and he asked the Bar Association to investigate the matter and make a public correction of what he regards as the current error. But I suggest that the name Jackson of itself implies a Scotch or English, and, farther back, a Scandinavian origin, and is not a Celtic name. The name Crawford, also in his family tree, is distinctly Saxon or Scandinavian, and not Celtic.

NOTE B. — Hon. John Allison, of Nashville, formerly Secretary of State for the State of Tennessee, has written a charming booklet entitled "Dropped Stitches in the History of Tennessee." In preparing this book he made a great many investigations into the judicial records of East and Middle Tennessee, and he found no record indicating that Andrew Jackson ever held the office of State Solicitor in the State of North Carolina; and he is of opinion that Jackson held only the office of Attorney-General of the territory southwest of the river Ohio. This, if true, would cut the period of service of Jackson as Public Prosecutor down to about two years; whereas most of his biographers credit him with a period of about seven years in that office.

NOTE C. — I allow the word "legislature" to stand in this address as it was printed prior to its delivery. It was delivered orally, and, in the oral speech, I substituted the words "field officers" for the word "legislature," out of deference to the statement of Hon. John Allison to the effect that the Major-General was elected by the field officers of the military district; that the election resulted in a tie between Jackson and Sevier; that thereupon the Governor of the State, acting in his character of Commander-in-Chief of the militia of the State, decided the election by casting his vote in favor of Jackson. This explanation is made in view of the fact that several learned gentlemen in the audience dissented from my oral statement that the election was by the field officers, having the understanding which I originally had, that it was by the legislature.

## THE RELATION BETWEEN ASSUMPTION OF RISKS AND CONTRIBUTORY NEGLIGENCE.

It is sufficiently obvious that, in an action involving the nature and extent of a master's obligation to indemnify his servant for a personal injury, the question whether the plaintiff was in the exercise of due care is wholly immaterial, where the peril which caused the injury was one of those ordinarily incident to the employment.<sup>1</sup> The presumption that he stipulated for a rate of wages which should be an adequate insurance against an accident of that kind is a conclusive bar to a claim for additional compensation in the form of damages. His capacity to maintain the action is governed entirely by the terms of the original contract of service, and it is mere supererogation to ask whether he was negligent or not in respect to his conduct before or at the time of the accident.

On the other hand, in the case of an injury resulting from a breach of one of those duties which the master owes to the servant, we are carried beyond the scope of the primary agreement, and transported into a field of rights and liabilities in which the operation of the doctrine of assumption of risks is neither paramount nor exclusive. So much is obvious and is neither disputable nor disputed. The difficulties of the inquiry begin when an attempt is made to extract from the reports a consistent and scientific theory as to the apportionment of the territory between the defenses based on the servant's acceptance of the risk and on his want of care. The net result of the portentous mass of decisions dealing with the effect of the servant's knowledge of the increased danger caused by the master's breach of duty, the point in which the whole controversy centers, is a veritable chaos of conflicting precedents.

The strangely befogged condition of mind which cases of this

<sup>1</sup> *Northern &c. R. Co. v. Husson* (1882), 101 Pa. St. 1.

class are apt to engender is strikingly exemplified by the fact that several judges have propounded the singular doctrine that there is no real distinction at all between the two defenses. "Assumption of risks," we are told, is a form of "contributory negligence."<sup>1</sup> Similarly the Supreme Court of Missouri speaks of "contributory negligence, or what is tantamount thereto, waiver."<sup>2</sup> Even that remarkably clear-sighted jurist, Judge Brewer, has hazarded the statement that there seems to be "some force" in the theory that "there is really no such thing as a separate and distinct defense of waiver, and that what is called waiver, is simply one form of contributory negligence, the difference between waiver and contributory negligence being the difference between passive and actual negligence."<sup>3</sup> So, in Alabama, after declaring that "for a servant to persist in exposing himself to danger on the faith of a promise may often be a want of ordinary prudence," the court went on to say that "his continuance in the service for an unreasonable length of time after such promise is a waiver of the defects agreed to be remedied by the employer."<sup>4</sup>

The misconception of elementary principles disclosed in these cases is quite extraordinary. It is impossible to understand the mental attitude of a judge who can ignore the familiar classifications of our law to the extent of identifying a defense based on a contract, or at all events a *quasi*-contract, with a defense based on the hypothesis that plaintiff is himself guilty of a tort. But for the evidence to the contrary the position that the defenses involve two theories as to the legal relations of the parties, and not one theory susceptible of a double characterization, might reasonably have been thought too clear to be disputed. It would be a waste of space to undertake to show by citations of cases that the expression, "assumption of risks," has acquired in legal terminology a definite meaning which connects it with con-

<sup>1</sup> *Nadau v. White River Lumber Co.*, 76 Wis. 120; *Darcey v. Farmers' Lumber Co.*, 87 Wis. 247; *Peterson v. Lumber Co.*, 90 Wis. 83.

<sup>2</sup> *Alcorn v. Chicago & C. Ry. Co.*, 108 Mo. 8. Compare *Thorpe v. Missouri & C. R. Co.* (1886), 89 Mo. 650, where

the views of this court on this point are stated at greater length.

<sup>3</sup> *O'Rourke v. Union Pac. R. Co.* (1884), 22 Fed. Rep. 189.

<sup>4</sup> *Eureka Co. v. Bass* (1886), 81 Ala. 200.

tract and not with tort,<sup>1</sup> and those who would treat as non-existent, in this particular case, the partition, which divides those two branches of the law are at least bound to produce some special reason for such a notable departure from the view usually accepted. This they have not done, and of course cannot do.

A milder form of the same confusion of thought is due simply to the double meaning of the phrase "assuming (or taking) risks," which is often employed even by the ablest courts, when it is plain from the context that they refer to the servant's negligence. The cases cited in the note are merely a few illustrations out of many that might be given of this error. They have been selected with a view to showing that this improper use of the phrase is by no means confined to courts which have shown a partiality for dealing with the continuance of the employment from the standpoint of contributory negligence, but crops up occasionally even in the opinions of the Supreme Courts of the United States, of Massachusetts, and of Pennsylvania, all of which have enforced the true doctrine of assumption of risks.<sup>2</sup>

<sup>1</sup> Mr. Beven (1 Negl. 774) objects to the use of the word "agreed" as suggestive of a contract in the matter of assumption of risks, and thinks the facts more often indicate election than agreement. The objection of the learned author appears to be decidedly hypercritical. But even supposing it to be well-founded the legal relation created by an election is *quasi-contractual* — using the word in the sense in which it is understood in the Roman law,—and is therefore wholly different from that which results from a tort.

<sup>2</sup> An employé is guilty of contributory negligence which will defeat his right to recover for injuries which result from dangers so obvious and threatening that a *reasonably prudent* man would have avoided them. "He will be deemed in such case to have *assumed the risks* involved in such

heedless exposure of himself to danger." *Kane v. Northern &c. R. Co.* (1888), 128 U. S. 91.

"If the servant's attention was given to the work which he was doing, so that he did not discover the danger till it was too late to save himself, we cannot say, as a matter of law, that he must be held to have *assumed the risk*. The case is close; but the evidence is sufficient to be submitted to the jury upon the question, whether he was *in the exercise of due care*." *Ferren v. Old Colony R. Co.* (1887), 143 Mass. 197. Compare *Anderson v. Duckworth* (1894), 162 Mass. 251.

"It is *negligence* in a servant to continue working after the master has refused to discharge an incompetent coservant, unless he intends to *assume the extra risk himself*." *United States &c. Co. v. Wilde* (1886), 116 Ill. 100. Compare *Illinois Steel Co. v.*



In other cases it is not easy to say whether the language of the court represents a doctrinal error, or is merely an illustration of a slovenliness of expression — as where a servant, under the given circumstances, was said to have “assumed the risks” of a business conducted with a defective appliance, and thus to have been guilty of contributory negligence if an injury occurred to him through their use.”<sup>1</sup>

Jurisprudence would soon cease to merit the name of a science if the boundary lines that separate its fundamental concepts were habitually blurred in this fashion. But the above specimens of downright intellectual obliquity or slipshod language are merely occasional eccentricities. The courts on the whole have accorded a full recognition to the fact that there is an essential distinction between the two defenses. There is no really serious conflict of opinion except as to the question whether the rights of a servant who continues to work, after he obtains knowledge of some danger caused by a breach of duty on the master's part, should be determined by the principle of assumption of risks or of contributory negligence.

In the subjoined table we have cited in two columns a sufficient number of rulings to indicate the position taken by each court of last resort in every jurisdiction in which this question has been raised in its elementary shape. The conflict of views is much less marked where the servant's knowledge has been considered in connection with other circumstances — such as a

Schmanowski, 162 Ill. 459; *Chicago & C. R. Co. v. Simmons* (1882), 11 Ill. App. 147. The same mistake is apparent in *Davis v. Baltimore & C. R. Co.* (1893), 152 Pa. 514; *Beittemiller v. Bergner & Co.* (Pa. Sup. Ct. 1888), 12 Atl. 599; *Eureka Co. v. Bass* (1886), 81 Ala. 200; *Louisville & C. R. Co. v. Woods* (Ala. 1895), 17 So. 41; *Pollich v. Sellers* (1890), 42 La. Ann. 623; *Graham v. Newburg & Co.*, 38 W. Va. 277; *Crutchfield v. Richmond & C. Co.* (1878), 78 N. C. 300; *Lake Shore & C. R. Co. v. Pinchin*, 112 Ind. 596; *Haas v. Balch* (C. C. A.), 56 Fed. Rep.

984; *Chicago & C. R. Co. v. Simmons* (1882), 11 Ill. App. 147.

<sup>1</sup> *Gulf & C. R. Co. v. Brentford* (1891), 79 Tex. 619. Almost identical language is used in *Lawrence v. Hagemeyer* (Ky. Ct. of App. 1892), 20 S. W. 704.

The Supreme Court of Kansas stops short of an actual identification of waiver with contributory negligence, but doubts whether the distinction between them “can be of much practical value.” *Rush v. Missouri & C. Co.* (1887), 36 Kan. 129.

promise by the employer to remove the danger, the fact that the servant was assured in whose opinion he was entitled to confide that he might continue working safely, and so forth (see below, p. 676),— and in order that the lines between each theory may be more sharply drawn, cases of this more complicated type have not been noticed. It may also be remarked, by way of explanation, that, in selecting the cases in the left-hand column, regard has been had merely to the actual defense raised, and not to the incorrect use of the phrase “assumption of risks” which, as already pointed out, frequently occurs where the real subject of discussion is the servant’s contributory negligence.

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TRIBUTORY NEGLIGENCE.**

**CASES TREATING CONTINUANCE WITH  
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SUMPTION OF RISKS.**

*England and Ireland.*

Griffiths v. Gidlow, 3 H. & N. 648;  
Senior v. Ward, 1 El. & El. 385;  
Hoey v. Ry. Co., 5 Ir. Rep. 206;  
Weblin v. Ballard, 17 Q. B. D. 122.

Saxton v. Hawksworth, 26 L. T. (N. S.)  
851;  
Smith v. Baker, [H. L. E. 1891] A. C.  
325, and cases cited.

*Federal Courts.*

Kane v. Northern C. R. Co., 128 U. S.  
91;  
Northern Pac. R. Co. v. Mares, 123 U.  
S. 710;  
Hough v. R. Co., 100 U. S. 213.

Southern Pac. R. Co. v. Seley, 152 U.  
S. 143;  
Baltimore & C. R. Co. v. Baugh, 149 U.  
S. 368;  
Washington & C. R. Co. v. McDade, 135  
U. S. 554.

*Alabama.*

Eureka Co. v. Bass, 81 Ala. 200.  
Wilson v. R. Co., 85 Ala. 264;  
Highland Ave. R. Co. v. Walters, 91  
Ala. 442.

*Arkansas.*

St. Louis & C. R. Co. v. Davis, 54 Ark.  
889;  
Fordyce v. Lowman, 57 Ark. 160.

*California.*

McGlynn v. Brodie, 31 Cal. 376;  
Sweeny v. R. Co., 57 Cal. 15;  
Snowdon v. Men. Co., 55 Cal. 443.

*Colorado.*

Burlington & C. R. Co. v. Ljehe, 17  
Colo. 280.

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*Connecticut.*

Hayden v. Mfg. Co., 29 Conn. 548.

*Florida.*

Florida &c. R. Co. v. Weese, 32 Fla.  
212.

*Georgia.*

Baker v. Western &c. R. Co., 68 Ga.  
699.

*Illinois.*

Rolling Stock Co. v. Wilder, 116 Ill.  
100;  
Illinois Steel Co. v. Schymanowski, 162  
Il. 459.

*Indiana.*

Louisville &c. R. Co. v. Corps., 124  
Ind. 429;  
Rogers v. Leyden, 127 Ind. 50;  
Ames v. Lake Shore &c. R. Co., 135  
Ind. 363.

*Iowa.*

Perigo v. R. Co., 53 Iowa, 276;  
Youll v. R. Co., 66 Iowa, 346.

*Kansas.*

Jackson v. R. Co., 31 Kan. 761.

McQueen v. R. Co., 30 Kan. 689;  
R. Co. v. Schroeder, 47 Kan. 315;  
Rush v. R. Co. 36 Kan. 129.

*Kentucky.*

Lawrence v. Hagemeyer, 20 S. W. 704. Bogenschutz v. Smith, 84 Ky. 330.  
Morton v. R. Co., 30 S. W. 599.

*Louisiana.*

Pollick v. Sellers, 42 La. Ann. 623.  
Bomakr v. R. Co., 42 La. Ann. 983.

Carey v. Sellers, 41 La. Ann. 500.

*Maine.*

Buzzell v. Lacombe Mfg. Co., 48 Me.  
113;  
Mundle v. Hill Mfg. Co., 86 Me. 400.

*Maryland.*

Michael v. Stanley, 75 Md. 464.

B. & O. R. Co. v. Stricker, 31 Md. 47;  
Renna v. Wachter, 60 Md. 395.

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SUMPTION OF RISKS.

*Massachusetts.*

Snow v. R. Co., 8 Allen, 441;  
Ford v. R. Co., 110 Mass. 240.

Pingree v. Leyland, 135 Mass. 398;  
Joyce v. Worcester, 140 Mass. 245;  
Hatt v. Nay, 144 Mass. 186.

*Michigan.*

King v. Lumber Co., 20 Mich. 105;  
Sowoda v. Ward, 40 Mich. 420.

Davis v. R. Co., 20 Mich. 105;  
Richards v. Rough, 53 Mich. 212.

*Minnesota.*

LeClair v. R. Co., 20 Minn. 9.

Clark v. R. Co., 28 Minn. 131;  
Bengster v. R. Co., 47 Minn. 486.

*Mississippi.*

Buckner v. R. Co., 72 Miss. 873.

[By § 193 of Miss. Const. of 1890,  
knowledge is no longer a conclusive  
defense, as it had previously been.]

*Missouri.*

Huhn v. R. Co., 92 Mo. 447;  
Settle v. St. Louis &c. R. Co. (1895),  
30 S. W. 125.

Devitt v. R. Co., 50 Mo. 302 [overruled  
by the series of cases, of which  
those in the opposite column are the  
first and last].

*Montana.*

Kelley v. Mining Co., 16 Mont. 484.

*Nebraska.*

Sioux City &c. R. Co. v. Finlayson, 16  
Neb. 578.

*New Hampshire.*

Foss v. Baker, 63 N. H. 247.

*New Jersey.*

Foley v. Electric Light Co., 54 N. J. L.  
411;  
Conway v. Furst, 32 Atl. 380;  
Western U. Tel. Co. v. McMullen, 33  
Atl. 384.

*New York.*

Davidson v. Cornell, 132 N. Y. 228;  
Mehan v. Syracuse &c. R. Co., 73 N.  
Y. 585.

Kaare v. R. C., 139 N. Y. 369;  
Gibson v. R. Co., 63 N. Y. 449.

*North Carolina.*

Porter v. Western &c. R. Co., 97 N. C.  
66.

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*Ohio.*

*Pittsburg &c. Co. v. Extlevenard*, 58  
Ohio St. 48;  
*Mfg. Co. v. Morrissey*, 40 Ohio St. 148.

*Med. Riv. R. Co. v. Barber*, 5 Ohio  
St. 562;  
*Lake Shore &c. R. Co. v. Knittel*, 33  
Ohio St. 468.

*Oregon.*

*Roth v. Northern P. L. Co.*, 18 Or. 205;  
*Brown v. Oregon L. Co.*, 24 Or. 315.

*Pennsylvania.*

[This court has taken up the position that "a servant assumes the risk of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care." *Pittsburg &c. R. Co. v. Sentmeyer*, 92 Pa. St. 276; but whether it intends to maintain that no other risks are assumed is not very clear.]

*Mansfield Coal Co.*, 91 Pa. St. 185;  
*Rummell v. Dilworth*, 11 Pa. St. 343;  
*Wanamaker v. Burke*, 111 Pa. St. 423

*Rhode Island.*

*McGrath v. R. Co.*, 14 R. I. 358.

*South Carolina.*

*Lasure v. Mfg. Co.*, 18 S. C. 275.

*Tennessee.*

*R. Co. v. Duffield*, 12 Lea. 67.

*Texas.*

*Texas &c. R. Co. v. Brentford*, 79 Tex.  
619 [overruled by the cases cited  
in the opposite column].

*Texas &c. R. Co. v. Conroy*, 85 Tex.  
216;  
*Texas P. R. Co. v. French*, 86 Tex. 99;  
*Texas &c. R. Co. v. Bryant* (Tex.  
Cir. App. 1894), 27 S. W. 825, where  
other cases are cited.

*Utah.*

*McCharles v. Min. Co.*, 10 Utah, 470.

*Vermont.*

*Carbine v. Bennington*, 61 Vt. 348;  
*Dumas v. Stone*, 65 Vt. 442.

*Virginia.*

*Richmond &c. R. Co. v. Norment*, 84  
Va. 167;

*Clark v. Richmond &c. R. Co.* (1884),  
78 Va. 709.

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SUMPTION OF RISKS.

*Washington.*

Olson v. McMurray &c. Co., 9 Wash.  
500.

*West Virginia.*

Woodell v. Improvement Co., 38 W.  
Va. 273;  
Graham v. Coal Co., 38 W. Va. 273.

*Wisconsin.*

The peculiar theory of this court has already been noticed (p. 668, *supra*).

Most of the courts whose views are represented by the decisions in the first column *only* have refrained from expressing any decided opinion as to the theoretical permissibility of the other doctrine, but in Missouri,<sup>1</sup> the principle that acceptance of the risk may be inferred from continuance of work with knowledge of the conditions has been specifically rejected. The Virginia case cited in that column would almost seem to commit the court to the doctrine that knowledge will not defeat the servant's claim under any circumstances, and that, to produce that result, there must have been some superadded act of negligence at the time of the accident. But, as the case was one in which the court was merely approving the refusal of the trial judge to give an instruction embodying the rule that knowledge is an absolute bar, it would perhaps be unjustifiable to take the language of the opinion too literally.<sup>2</sup> If this is the meaning of the decision, it overrules the case cited in the right hand column, which applied, in its severest form, the doctrine that a trainman injured by a low bridge of which he has constructive knowledge cannot maintain an action against his employer. In Missouri the rule unquestionably is that the servant's right to

<sup>1</sup> See however Judge Thompson's article in the January number of this REVIEW showing how strangely the two appellate courts of this State have wavered in their opinions.

<sup>2</sup> In the subsequent cases Chesapeake &c. R. Co. v. Lee, 84 Va. 642;

Norfolk &c. R. Co. v. McDonald, 13 S. E. 706, there was evidence of negligence in the performance of duties but the former case also seems to involve a recognition of the defense of assumption of risks.

recover can only be defeated by proof that he was imprudent in continuing to encounter the danger, or in regard to his conduct when the injury was received.<sup>1</sup>

Cases dealing with the duty of a master to indemnify his servant for personal injuries are far from being the only ones which may be approached from the side of contract or of tort, but it is abundantly evident from the above table that these cases must involve circumstances admitting, in quite an exceptional degree, of this alternative method of treatment.<sup>2</sup> That

<sup>1</sup> The Missouri theory is apparently to be credited very largely to the well-known treatise of Negligence by Messrs. Shearman and Redfield (see § 208; Ed. 1888), who, in our humble judgment, have, in this particular instance, allowed their very proper indignation at the detestably unfair consequences which often spring from the principle of assumption of risks to cloud to some extent their legal insight. We have no space for a detailed criticism, but it may be remarked that one main buttress of the theory of the learned authors is that, under the general law of contracts, a party to the agreement having mutual obligations is allowed to perform fully his part, notwithstanding the failure of the other party to fulfill a condition precedent, without waiving his right to insist on the performance of such condition at a later period (§ 215, Ed. 188). The rule is precisely the reverse (see Bishop Contr., § 839; also a note written by the author of the present article for the American State Reports: Vol. 33, pp. 791 *et seq.*).

Nor do the cases cited by the learned authors go to the length ascribed to them. Some involve special features from which a suspension of the operation of the principle of assumption of risks may be inferred, as *Hauley v. Northern &c. R. Co.*, 17 Hun, 115; 82 N. Y. 370 [special order accompanied by

assurance of safety]; *Patterson v. R. Co.*, 76 Pa. 389 [promise of repairs and direct order of master]; *Clarke v. Holmes*, 7 H. & N. 937 [promise of repairs]. Another decision much relied on, *McMahon v. Iron Co.*, 24 Hun, 48, even if it will bear the construction placed upon it,—which is very doubtful—is now of no weight in the face of later decisions by the New York Court of Appeals: *Appel v. Buffalo &c. R. Co.*, 111 N. Y. 550; *Kaare v. Troy &c. R. Co.* (1893), 139 N. Y. 369; *Kinsley v. Pratt* (1896), 148 N. Y. 373. Other rulings cited merely illustrate the general principle that cases of this class are mostly of double aspect: *e. g.* *Senior v. Ward*, 1 El. & El. 385; *Thorn v. R. Co.*, 8 Allen, 441; *Hough v. R. Co.*, 100 U. S. 213. These were all decided by courts whose views on the admissibility of the defense of assumption of risks under such circumstances, and its totally distinct character, are beyond dispute (see the above table).

<sup>2</sup> The two defenses of assumption of risks and contributory negligence are not often categorically mentioned and distinguished in the same case. But some of the later decisions in various States indicate a recognition of the fact that under almost every conceivable state of circumstances, the rights of the parties should be considered from both points of view:

this is the true and sufficient explanation of the remarkable divergencies of view here exhibited will be perfectly apparent from a comparative analysis of the several predicaments which may come up for consideration, when the master relies for a defense on the fact that the servant went on working after learning that he was exposed to an extraordinary risk.

In the first place, if the servant's position is considered from the standpoint of tort, it is clear that the circumstances may indicate the existence of contributory negligence in one of the following forms:—

I. Failure to observe some abnormal condition of the agencies of the work.

II. Failure to appreciate the fact that such abnormal condition is likely to injure one who is exposed to it.<sup>1</sup>

III. Failure to report to the master the existence of a danger which has come to his knowledge.<sup>2</sup>

IV. Failure to adopt that course of action which would com-

*e. g.* *Donahue v. Drown* (1891), 154 Mass. 21; *Louisville &c. R. Co. v. Sandford*, 117 Ind. 269, and the Texas cases cited in the right hand column of the above table.

<sup>1</sup> These two breaches of duty are often confounded, but it is important to discriminate between them, because, while it has frequently been held that continuance of work with a full appreciation of the risk will, as a matter of law, render the servant guilty of contributory negligence, it is doubtful whether any well-considered case can be found which treats mere knowledge of a defective state of the appliances as anything more than evidence of negligence. The difficulty raised by the consideration that the servant's action may be barred by proof that he failed to obtain knowledge, while even if knowledge is brought home to him he is still under the authorities, usually entitled to go to the jury on the question whether his continuance

of work with such knowledge or conduct at the time of the accident, was negligent, has not been fairly grappled with by the courts.

<sup>2</sup> That negligence which consists in not informing the master of a danger which has come to the knowledge of a servant is recognized as a specific ground of defense at common law, as it also is by the express provisions of the English Employers' Liability Act and the Acts modeled upon it: See *Lake Shore &c. R. Co. v. Stupak* (1886), 108 Ind. 1; *Toledo &c. R. Co. v. Eddy* (1884), 72 Ill. 138; *Davis v. Detroit &c. R. Co.* (1870), 20 Mich. 105; *Penna. R. Co. v. Hayler*, 119 Pa. 80, and many other cases; but, as a matter of practice, this sort of negligence like those under I. & II. is almost always coupled with that which is inferred from the continuance of the work, or leads up to defense of waiver. See for example the first case cited above.



mend itself to a prudent man who, after observing that the instrumentalities were in an abnormal condition, should be called upon to determine whether he ought to continue in or abandon the employment.

The answer to the question whether his conduct in the premises was such as to absolve him from the charge of negligence, will depend upon several circumstances of which the following are the most important:—

- (a) The imminence of the danger.<sup>1</sup>
- (b) The special exigencies of the service at the particular moment when the servant is called upon to make a decision.<sup>2</sup>
- (c) The fact that the master or some agent qualified to speak for him, has assured the servant that the work is safe.<sup>3</sup>
- (d) The fact that the master has actually promised to amend the conditions which create the danger.<sup>4</sup>
- (e) The fact that the servant is obeying a peremptory command, and has no time to ascertain the precise extent of the danger to which he will be exposed.<sup>5</sup>
- (f) The fact that the servant is obeying a command given so roughly as to produce in him a mental confusion which renders him unable to comprehend fully the danger.<sup>6</sup>
- (g) The fact that the subject was acting to some extent under compulsion — a predicament of which some of the facts already noticed obviously tend to establish the existence, especially (b), (e) and (f).

<sup>1</sup> *Huhn v. R. Co.*, 92 Mo. 447; *Louisville & C. R. Co.*, 117 Ind. 269.

<sup>2</sup> An excellent illustration of the bearing of the facts under (a), (b) and (d) upon the question of the servant's negligence is *Kane v. Northern & C. R. Co.* (1888), 128 U. S. 91, where it was held that an employé on a train owes it to the public, as well as to his employer, not to abandon his post unnecessarily, and that the absence of a step in one of the cars did not create a danger so imminent as to subject him to a charge of recklessness in remaining at his post, upon receiving an assurance from the conductor that the

defective car would be thrown out of the train when it reached a station a few miles distant from the place where he noticed the defect.

<sup>3</sup> *Patterson v. Wallace*, 1 *Macy*, H. L. C. 748; *Haas v. Balch*, 56 Fed. 984.

<sup>4</sup> *Clarke v. Holmes*, 7 H. & N. 937; *Missouri & C. Co. v. Abend*, 107 Ill. 44.

<sup>5</sup> *Stockman v. Chicago & C. R. Co.*, 80 Wis. 428; *Fox v. Chicago & C. R. Co.*, 86 Iowa, 368.

<sup>6</sup> *Williams v. Churchill*, 137 Mass. 243.

V. Failure to use precautions appropriate to the increased risks to which he knows himself to be exposed.<sup>1</sup>

Let us, in the next place, consider what aspect the facts thus referred to the test of contributory negligence will present, when viewed from the standpoint of assumption of risks or of waiver. The first two breaches of duty, it is clear, are represented in the general rule respecting that defense by the principle which assimilates constructive or obligatory knowledge to actual knowledge. The omission which, in the former case, serves as an independent reason for denying the servant's right of recovery, undergoes in the latter a species of metamorphosis, and appears in the form of an imputation, which stands merely as one of the elements which go to the making of the contract relation.<sup>2</sup>

The third breach of duty becomes in this connection another of the subordinate facts from which it is inferred that the servant intends to accept the risks, and is often coupled with his actual or constructive knowledge in statements of the general rule as to assumption of risks.<sup>3</sup>

In regard to the fourth breach of duty, we perceive that, though the various circumstances mentioned as bearing upon the question of negligence, cannot, without much forcing of language, be dealt with from a contractual point of view, a comparison may be drawn which is highly instructive for our present purposes. Taking those circumstances in the same order as they are specified above, the following statement will show where the parallelism holds and where it fails:—

(a) The imminence of a danger is plainly an entirely irrelevant

<sup>1</sup> *Lawless v. Conn. Rev. Co.*, 136 Mass. 1; *Gustafson v. Washburn & Co.* (1890), 153 Mass. 468.

<sup>2</sup> The general principle involved is that a man "cannot be permitted to found a right of action upon his ignorance of what every man of ordinary faculties placed in the same circumstances, and using his faculties in the usual way would have appreciated, and which he must, therefore, be held to have appreciated." *Goldthwait v. Haverhill & C. R. Co.* (1894), 160 Mass.

554. Compare *Rogers v. Leyden* (1890), 127 Ind. 50.

<sup>3</sup> See for example *Washington & C. R. Co. v. McDade*, 135 U. S. 554; *Davis v. Detroit & C. R. Co.*, 20 Mich. 105. That there may be cases where a court will be averse to holding that a servant assumed the risk because he hesitated to complain lest he should lose his place was recognized in *Goldthwait v. Haverhill & C. R. Co.* (1894), 160 Mass. 554, but the circumstances were held inappropriate for the application of this principle.

matter when the essential question is whether the servant accepts the risks which the existence of that danger entails. The greater or less extent of the peril is of no importance where it has been once ascertained that the danger, such as it was, was appreciated.

(b) The fact that serious damage may accrue to the employer, and even to the general public, may clearly be of great moment in determining whether the continuance of work was voluntary, in a liberal sense of the word, or induced by that species of moral coercion which is based on the reluctance to abandon the performance of duties, when the abandonment would temporarily paralyze the operations of some important business concern.<sup>1</sup>

(c) An assurance from one upon whose opinion the servant is entitled to rely has a material bearing on the question whether he assumed the risk, for the obvious reason that, if he believed another's statements, and they turn out to be erroneous, a full appreciation of the risk is not proved.

(d) The promise of the master that the work will be made safer may be regarded as affecting a change in the terms of the contract, and suspending the operation of the principle of assumption of risks for a reasonable period after the promise is given.<sup>2</sup>

(e) and (f) That the work which was the immediate cause of the injury was done in compliance with a special order is theoretically competent as evidence that the risk was not assumed, whether it be on the theory that it may show that the acceptance of the risk was not voluntary, or that the risk itself was not appreciated.

It must be conceded, however, that cases of this class are more

<sup>1</sup> See *Smith v. Baker* (H. L. E.) [1891], A. C. 325, for a recognition of this principle. Compare *Strong v. Iowa &c. R. Co.* (Iowa), 62 N. W. 799.

<sup>2</sup> Mr. Justice Byles, during the argument of counsel in *Clarke v. Holmes*, 7 H. & N. 937, put this query: "While the machinery was fenced, was not this the contract of the plaintiff: 'I will work with

fenced machinery;' after it was broken, was not the contract: 'I will continue to work, if you will restore the fencing?'"

*Schlacker v. Mining Co.*, 89 Mich. 253, and *Northern R. R. Co. v. Babcock*, 154 U. S. 190, may also be cited as cases showing how the effect of a promise may be considered from the standpoint of assumption of risks.

appropriately referred to the principle of contributory negligence.<sup>1</sup>

(g) Under this head, it is merely necessary to point out that an essential prerequisite to the validity of a contract is that it shall not have been entered into under coercion. If compulsion is shown, the inference that the risk was accepted is negated.<sup>2</sup>

The cases under the fifth head obviously carry us into a domain in which the operation of the principle of contributory negligence should, properly speaking, be exclusive. But many illogical decisions have been produced by the final reliance of the courts on the servant's carelessness in the manner of performing his work when in other parts of the opinion they have spoken of the peril which caused the injury as one of the risks assumed.<sup>3</sup>

In other instances the defense of assumption of risks might plainly have been raised, but was passed over for no apparent reason.<sup>4</sup> Still more illogical are the decisions in which the servant's right to recover is denied on the ground of his want of care, when the evidence fails to show that the employer was in fault.<sup>5</sup> It is, to say the least, a matter for regret, that a branch of law which is

<sup>1</sup> See *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327.

<sup>2</sup> *Yarmouth v. France*, 19 Q. B. D. 647, was a case in which the question of acceptance was held to be for the jury because there was some evidence of compulsion.

<sup>3</sup> Illustrations of this unnecessary accumulation of the two defenses for no apparent reason that can be discovered will be found in *Poland v. Chicago &c. R. Co.*, 44 La. Ann. 1003; *Wormell v. Maine &c. R. Co.*, 79 Me. 397; *New York &c. R. Co. v. Lyons*, 119 Pa. 324; *Jenney &c. R. Co. v. Murphy*, 115 Ind. 570; *Way v. Chicago &c. R. Co.*, 76 Iowa, 393; *Chesapeake &c. R. Co. v. Lee*, 84 Va. 642; *Rutherford v. Chicago &c. R. Co.*, 57 Minn. 237; *Nolan v. Shickle*, 69 Mo. 336; *Kraeft v. Meyer*, 92 Wis. 252; *Chicago &c. R. Co. v. Donahue*, 75 Ill. 106; *Gleason v. Excelsior Mfg. Co.*, 94 Mo. 201;

*Crowl v. New York &c. R. Co.*, 70 Hun, 37; *Sheets v. Chicago &c. R. Co.*, 139 Ind. 632. Sometimes, however, this confusion is apparently due rather to that want of precision in the use of the expression "assumption of risks" which has been commented on above than to an actual shifting of ground.

<sup>4</sup> See for example *St. Louis &c. R. Co. v. Mara* (Ark. 1891), 16 S. W. 196; *Lawless v. Conn. R. Co.*, 136 Mass. 1; *Ray v. Jeffries* (1887), 86 Ky. 367.

<sup>5</sup> See for example *Jones v. Sutherland*, 91 Wis. 587, where an employé was injured in working about an appliance constructed in the usual and necessary manner. Compare *Loring v. Kansas City &c. R. Co.* (Mo. 1895), 31 S. W. 6, where no negligence was shown on the part of the fellow-servants for whose acts the master is liable in that State.

clogged with so many uncertainties should be still further embarrassed by opinions in which the judges first stand on one foot and then on the other, or arbitrarily adopt a defense which it is wholly unnecessary to adduce if another which is suggested by the facts can be made good.

The foregoing analysis brings into bold relief that double aspect of these cases which has caused so much confusion. This characteristic clearly depends not merely upon the general principle that a person's voluntary exposure to a known danger may be regarded either as conduct from which it may be inferred that he intends to waive any rights which he may have to be indemnified for a resulting injury, or as conduct which betokens a want of care, but also upon the special circumstance that the various accessory facts which usually have to be considered where the person exposing himself to danger is a servant are themselves mostly susceptible of treatment upon either of these theories.

The analysis also sets the *rationale* of the distinction between the two defenses in such a strong light, that it seems quite unnecessary to resort for the purpose of differentiation to the theory that defense of assumption of risks is, and the defense of contributory negligence is not, within the purview of the maxim, *Volenti non fit injuria*.<sup>1</sup> To this theory, moreover, there are some grave objections; in the first place the earlier decisions quote the maxim as being applicable indifferently to contributory negligence,<sup>2</sup> as well as to assumption of risks.<sup>3</sup> In the next place, it is extremely difficult, if not impossible, to reconcile this view with the literal meaning of the most significant word in the maxim. "Volenti" simply implies voluntary action, and the idea of negligence just as clearly presupposes the exercise of an unconstrained will by an intelligent agent as does the idea of

<sup>1</sup> *Thomas v. Quartermaine*, 18 Q. B. D. 685, was the first case in which this theory was broached, and in later English cases, the defense resting on the principle embodied in the maxim has been always discussed on the hypothesis that it is wholly different from that of contributory negligence. *Yarmouth v. France*, 19 Q. B. D. 647; *Thruswell v.*

*Handyside*, 20 Q. B. D. 359; *Osborne v. London & C. Ry. Co.*, 21 Q. B. D. 685; *Smith v. Baker (H. L. E.)* [1891], A. C. 825.

<sup>2</sup> *Senior v. Ward*, 1 El. & El. 385, and cases cited in *Broom's Maxims*.

<sup>3</sup> *Skip v. Eastern & C. R. Co.*, 9 Exch. 223.

assumption of risks. Considering the eminence of the judges who have accepted the new theory, neither of these objections would have much weight, if they had been fairly met and discussed. But nothing in the decisions referred to indicates that those judges recollected the earlier authorities, or gave any serious attention to the fact that they were narrowing the meaning of the maxim in a manner not justified by any reasonable canons of interpretation. The only question presented for settlement in *Thomas v. Quartermaine*,<sup>1</sup> was whether the doctrine of assumption of risks had been abolished by the Employers' Liability Act, and the conclusion that it survived, might, with perfect propriety, have been referred to the principle that, as the maxim was independent of any special contract relations, the master was entitled to avail himself of *any* of the several defenses embraced under it, which were open in actions between strangers.<sup>2</sup>

The conclusion of the whole matter would seem to be simply this,—that, when the employer alleges and proves an appreciation of the danger on the part of the servant and a continuance of work with that knowledge, this allegation and proof introduce into the case two distinct issues. The investigation may take either the form of an inquiry, whether the continuance is to be regarded as circumstantial evidence of the servant's acceptance of the responsibility for any injuries which he may receive from the dangerous instrumentality, or the form of an inquiry, whether such continuance indicates a want of care. In either case the master's defense is not made out unless the servant is shown to have acted as a voluntary agent, but when the case is approached from the contractual side, the servant's intention becomes a material factor, while, if it is sought to charge him with negligence the intention is, of course, wholly immaterial.

<sup>1</sup> *Supra*.

<sup>2</sup> It is impossible to read the famous opinion of Bowen, L. J., in this case without coming to the conclusion that his attention was not directed, as it should have been, to the fact that the defense of contributory negligence is not necessarily precluded, because the plaintiff is shown

to have acted with due care *at the time the injury was received*. As has been already pointed out, negligence may also consist in *continuing* to expose oneself to danger where no prudent man would do so. This distinction between an occasional and a persistent want of care has been improperly ignored in the later English cases also.

The more logical order in which to determine the two issues is that adopted in the above statement, for it is natural to ask, in the first place, whether the contractual relations of the parties extend to the subject-matter of the action.

As both of the issues involved present questions of fact, the liability of the employer should, in theory, be left to the jury under almost all circumstances, and the recent English decisions cited above have enforced this view with a liberality wholly unexpected in a country where class interests are, with some justice, supposed to have exercised a very decided influence upon the development of this department of the law. In fact the older rulings as to the functions of the court and jury in this regard cannot any longer be considered good law.<sup>1</sup>

In this country the rule that, when the knowledge of the servant has been found, the court will infer assumption of risks, as a matter of law, is still virtually unshaken, though the Supreme Court of Massachusetts has recently expressed its approval of the "just and reasonable doctrine" of *Smith v. Baker*, with which it has declared that none of its previous decisions are necessarily inconsistent.<sup>2</sup> Anyone who is familiar with those decisions need not be told that this assertion must be taken *cum grano salis*, but it is gratifying to record it as a sign of an awakening to better things.

That this halting recognition of the English rule will soon be exchanged for a frank acceptance is a consummation devoutly to be wished, for it furnishes a ready means of reconciling the principles of logic with the dictates of humanity, and the immediate result of its general application would be the drying up of the most copious of the sources of that stream of Draconian decisions which have produced a most mischievous distrust of our courts in the minds of a large and most deserving class of the community.

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<sup>1</sup> It is interesting to note that Lord Bramwell, the most vigorous champion of the former anti-social doctrine that the employer may "do what he will with his own," was the only dissentient in *Smith v. Baker*, *supra*,

which has extended the right to the jury so far that the cases in which a court would set aside a verdict, must henceforth be very rare indeed.

<sup>2</sup> *Mahoney v. Dore*, 155 Mass. 578.

## THE RIGHT OF THE PUBLIC TO REGULATE THE CHARGES OF COMMON CARRIERS AND OF ALL OTHERS DISCHARGING PUBLIC, OR QUASI-PUBLIC DUTIES.

The decisions on this subject by the Supreme Court of the Union have been quite uniform and have so thoroughly illuminated and settled the whole matter that it can be discussed with small reference to the decisions of other tribunals.

The right of the public to regulate the charges of common carriers, even in times when the public granted no franchises, and conferred no right of eminent domain, is far older than the common law, older even than the civil law and was recognized by both as a necessary and an unquestioned rule. Twenty-one years ago, in 1876, the Supreme Court of the United States was first called upon, pointedly to review and reaffirm the recognized law of the ages that the sovereign possessed the right to regulate the charges for services rendered in a public employment, or for the use of property affected with a public interest. The particular instance was the constitutionality of an act of the General Assembly of Illinois regulating the charges of warehouses for the storage of grain. It was contended that, unlike railroads and telegraph companies, the public had conferred no franchise by an act of incorporation, nor used the right of eminent domain to take private property for their use and hence that the right to regulate warehouse rates was not to be placed on the same footing as the unquestioned public right to regulate the charges of common carriers. The underlying principle, however, was held to be broad enough to embrace the public right to fix and control the charges of grain warehouses. Though the pressure of immense interests was brought to bear to swerve the court from the well beaten track by the aid of the ablest and most skillful members of the bar, it firmly held to the principles which have always been law among Anglo-Saxon people. The court laid



down the following principles to which, with one slight deviation, it has ever since adhered:—

“ 1. Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens towards each other, and when necessary for the public good, the manner in which each shall use his own property.”

“ 2. It has, in the exercise of these powers, been customary in England from time immemorial, and in this country from the first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, auctioneers, inn-keepers, and many other matters of like nature, and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished and articles sold.”

“ 3. The Fourteenth Amendment to the United States constitution does not in anywise amend the law in this particular.”

“ 4. When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public.”

“ 5. The limitation by legislative enactment of the rate of charges for services rendered in an employment of a public nature, or for the use of property in which the public has an interest establishes no new principle in the law, but only gives a new effect to an old one.”

The opinion was rendered by Chief Justice Waite and is a very able and elaborate one.<sup>1</sup> Only two judges out of the nine upon that court (United States Supreme Court) dissented from any part of the opinion. It is doubtful if a more important one has been delivered by that court in recent years than this clear reaffirmation of the immemorial law that the public has the right to regulate charges in all matters affected with a public use. The court pointed out that Sir Matthew Hale, long years ago, had laid it down in his treatise *De Jure Maris*, that the sovereign could regulate the conduct and tolls of public ferries and in his treatise *De Portibus Maris*, had laid down the same as the rule of the common law as to wharves and wharfingers and as to

<sup>1</sup> *Munn v. Illinois*, 94 U. S. 113.

all other property and avocations "affected by a public interest," and cite many English and American decisions, recognizing this to be a true statement of the well settled "law of the land." The court in that case well say that in all such matters: "The controlling fact is the power to regulate at all. If that exists the right to establish the maximum of charge as one of the means of regulation, is implied. In fact the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use. \* \* \* To limit the rate of charges for services rendered in a public employment or for the use of property in which the public has an interest, is only changing a regulation which existed before," and therefore the court declared that it is not "a taking of property without due process of law." The court then further said, "We know that this is a power which may be abused but that is no argument against its existence. For protection against abuses by legislatures, the people must resort to the polls, not to the courts."

This is a very plain and straightforward declaration of the immemorial law and though that court under tremendous pressure has since intimated that the courts might supervise legislative action if the rates should ever be such as to destroy the value of property, it has never infringed upon its declaration that the people through its representatives in the law-making body could prescribe rates and the court in fact has never ventured to set aside the legislative rates in a single case ever brought before it on the ground that they were unreasonable, nor has it fixed the precise line at which it would assume to intervene.

By all the decisions the right to fix rates being not a judicial but a legislative power, to be exercised by the legislature itself or through a commission created by it, it logically follows that as the court said in this case, and reaffirmed in *Budd v. New York*,<sup>1</sup> the remedy for a harsh exercise of the power (if it should ever happen) is a recourse to the people at the ballot box, not to the courts. For an unwise or oppressive use of its powers,

<sup>1</sup> 148 U. S. 516.

the legislature is not subject to the supervision of the judiciary which is merely a co-ordinate branch of the government. It is only when the legislature does an act, whether wisely or unwisely, which is not within the scope of its powers, that the courts can declare it unconstitutional.

In this same case <sup>1</sup> the court further holds that the provision in the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws" has no application, for "certainly," it says, "it can not be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago unless it does the same thing in every other place in its jurisdiction." This rule has since been reiterated in *Dow v. Beidelman*.<sup>2</sup>

Some time has been given to the consideration of *Munn v. Illinois*, as it is the leading one which maintained the ancient landmarks which protected the people from excessive and unreasonable charges. No case has been more often cited since and approved. If at common law the public had a right to regulate the charges of stage lines, grist mills, bakers, chimney-sweeps, inn-keepers and the like, as to whom the public conferred no franchises, for an overwhelming reason it must possess that right as to the modern carriers by rail, whose companies receive their existence from the public will and have the breath of life breathed into them by legislative act. Beyond that, railroad corporations are vested with the power of eminent domain since power is given to them to take possession of the lands of others, against their will, in order to build their tracks. This could only be done if these corporations are created for the public benefit, since the constitution forbids private property to be taken "except for public uses."

In the very next case to *Munn v. Illinois*, the Supreme Court of the United States held <sup>3</sup> that railroads being common carriers for hire are "subject to legislative control as to their rates of fare and freight" and that the State not having exercised the right for a long series of years made no difference, for a government could lose none of its powers by non-user; and further that it did not

<sup>1</sup> *Munn v. Illinois*.

<sup>2</sup> 125 U. S. 680.

<sup>3</sup> *Chicago R. R. v. Iowa*, 94 U. S. 155.

“affect the case that before the legislature had fixed the maximum rate the company had pledged its income as security for debt and had leased its road to a tenant who paid a higher rent because the rates had not been reduced by legislative enactment, since the company held its franchise subject to the legislative power to regulate rates and it could not convey either to its mortgagee or its lessee greater rights than it had itself.” The opinion in this case also was written by the Chief Justice. The same decision<sup>1</sup> sustained the power of the legislature to classify railroads according to the amount of business done and to prescribe “a maximum of rates for each of the classes,” the court saying that a uniform rate for all railroads in the State might possibly operate unjustly and that at any rate it was in the discretion of the general assembly to classify the roads and fix different rates. In fact in the latest case, *Covington v. Sanford*,<sup>2</sup> it was held that it was in the legislative power to prescribe a different rate for each road.

In *Peik v. Chicago*,<sup>3</sup> the court held, the Chief Justice again delivering the opinion, that where a railroad was chartered by two or more States, each State had nevertheless the right to fix the rates between any two points in its own territory, and further said, quoting *Munn v. Illinois*, that the legislature and not the courts, must say what are reasonable rates, for the legislative rate “binds the court as well as the people. If it has been improperly fixed the legislature, not the courts, must be appealed to for the change.” And on the next page,<sup>4</sup> the court again held that the maximum fixed by the legislature is binding and the railroad company will not be permitted to collect more by showing in the courts that the prescribed rate is unreasonably low. This has since been reaffirmed in *Budd v. New York*.<sup>5</sup>

This question, however, cannot arise as to rates which shall be fixed by the legislature or the railroad commission in those States, in which the statute provides that the rates thus prescribed shall be deemed *prima facie* reasonable and that if any

<sup>1</sup> Cited and approved since in *Ruggles v. R. Co.*, 108 U. S. 526, and *R. Co. v. Illinois*, 108 U. S. 541, and in other cases.

<sup>2</sup> 164 U. S. 578.

<sup>3</sup> 94 U. S. 164.

<sup>4</sup> *Chicago v. Ackley*, 94 U. S. 179.

<sup>5</sup> 148 U. S. 516, at pp. 546, 547.

common carrier shall deem the rates prescribed too low, the company may appeal to the courts. On such appeals the court and a jury of twelve men can pass upon and settle the fact in dispute whether the rate is reasonable or not. Nothing can be fairer than to submit the question to the same tribunal which settles all disputed issues of fact when the lives, liberty, rights and property of any citizen are at stake.

The right of the public to regulate rates is not restricted to those avocations which are essentially monopolies, as railroads and the like, but it applies to all matters which are affected by a public use. This was carefully considered by the Court of Appeals of New York in *People v. Budd*,<sup>1</sup> in which it was declared that the right of regulation by the public is not restricted to cases in which the owner has a legal monopoly or some special governmental privilege or protection, but extends to all public employments and property. In that case a statute fixing a minimum charge for grain elevators was sustained. This decision upon writ of error was affirmed by the Supreme Court of United States,<sup>2</sup> and to same effect is *Brass v. North Dakota*.<sup>3</sup>

The right of regulation applies also to *water companies*,<sup>4</sup> and in a recent Texas case the right to regulate the charges of *cotton compresses* is recognized, and there are also cases recognizing the right to regulate charges of *tobacco warehouses* and of warehouses for storing and weighing cotton, and to regulate services and charges of *general warehousemen*.<sup>5</sup>

The same right of public regulation of rates applies to *street railways*.<sup>6</sup> And to *canals*,<sup>7</sup> and to *ferries*,<sup>8</sup> to *toll roads and bridges*.<sup>9</sup>

And *wharf charges*,<sup>10</sup> and to *telegraph rates*,<sup>11</sup> and to *telephone*

<sup>1</sup> 117 N. Y. 1.

<sup>2</sup> *Budd v. N. Y.*, 143 U. S. 517.

<sup>3</sup> 158 U. S. 391.

<sup>4</sup> *Spring Valley v. Schottler*, 110 U. S. 347.

<sup>5</sup> *Delaware v. Stock Yards*, 45 N. J. Eq. 50.

<sup>6</sup> *Buffalo R. Co. v. Buffalo*, 111 N. Y. 132; *Sternberg v. State*, 36 Neb. 307; *Parker v. Railroad*, 109 Mass. 506.

<sup>7</sup> *Perrine v. Canal Co.*, 9 Howard (U. S.), 172.

<sup>8</sup> *Stephens v. Powell*, 1 Ore. 283; *State v. Hudson Co.*, 23 N. J. L. 206; *Parker v. Railroad*, 109 Mass. 506.

<sup>9</sup> *Covington v. Sanford*, 14 Ky. 689; *Ibid.*, 164 U. S. 578; *California v. R. Co.*, 127 U. S. 1.

<sup>10</sup> *Ouachita v. Aiken*, 121 U. S. 444.

<sup>11</sup> *Mayo v. Tel. Co.*, 112 N. C. 343; *R. R. Commission v. Tel. Co.*, 113 N.

*charges*, although the telephone is covered by a United States patent.<sup>1</sup>

As to *gas companies*, the right of the State to regulate rates either itself or through power conferred upon municipal corporations is beyond controversy.<sup>2</sup> The power to regulate *water rates* has already been cited as decided in *Spring Valley v. Schotler*,<sup>3</sup> and the right to authorize municipal bodies to regulate the price, weight and *quality of bread* is declared upon the precedents to be settled law.<sup>4</sup>

The power to regulate the tolls of *public mills* is declared, citing many precedents, in *State v. Edwards*,<sup>5</sup> *West v. Rawson*.<sup>6</sup> Also the power to fix the rates for the *salvage of logs*.<sup>7</sup> The above are but a few of the cases recognizing the inherent public right to regulate those matters, and there are still many other matters recognized as subject to public regulation.

It is not to be forgotten that there is a broad distinction in the law, running through all the ages, between the above and similar avocations "affected with a public interest" as to which the sovereign or the public has the right to regulate and fix rates, and purely private matters, as farming, selling merchandise, manufacturing and similar matters, which are purely private in their nature and as to which the public has never claimed or exercised the right of regulation. It is by ignorance or an affected ignorance of this broad distinction in the law and which is based on the essential difference in the nature of things that denial has been sometimes attempted (by those not lawyers) of

C. 213; *Leavell v. R. Co.*, 116 N. C. 211; *People v. Budd*, 117 N. Y. 1; *State v. Edwards*, 86 Me. 105.

<sup>1</sup> *Hockett v. State*, 105 Ind. 250; *Telephone Co. v. Bradbury*, 106 Ind. 1; *Johnson v. State*, 113 Ind. 143; *Telephone Co. v. State*, 118 Ind. 194 and 598; *Telephone Co. v. B. & O. Telegraph Co.*, 68 Md. 399.

<sup>2</sup> *Toledo v. Gas Co.*, 5 Ohio St. 557; *State v. Gas. Light Co.*, 34 Ohio St. 572; *Zanesville v. Gas Light Co.*, 47 Ohio State, 1; *New Memphis v. Memphis*, 72 Fed. Rep. 952; *Capital City v. Des Moines*, *Ibid.* 829; *Gas Light Co. v.*

*Cleveland*, 71 Fed. Rep. 610; *State v. Laclede*, 102 Mo. 472; *Foster v. Findlay*, 5 Ohio C. C. 455; *Manhattan v. Trust Co.*, 16 U. S. App. 588; *State v. Cincinnati*, 18 Ohio State, 262.

<sup>3</sup> 110 U. S. 347.

<sup>4</sup> *Mobile v. Yuille*, 3 Ala. 137; *Munn v. People*, 69 Ill. 80.

<sup>5</sup> 86 Me. 102.

<sup>6</sup> 40 W. Va. 480.

<sup>7</sup> *West Branch v. Fisher*, 150 Pa. 475; *Pere Marquette v. Adams*, 44 Mich. 403; *Underwood v. Pelican Boom Co.*, 76 Wis. 76.

the right of public regulation in matters as to which the public has always possessed that right.

From the beginning of these States as colonies our statute books have borne provisions regulating the tolls of public mills, and until very recent years the county courts fixed the charges of inn-keepers, hotels and bar rooms. The latter regulations have been abandoned of late years not because the power does not still exist but because its exercise was no longer required to protect the public, the multiplication of inns and hotels furnishing sufficient protection by reason of competition. The regulation of the tolls of grist mills, ferries and the like is still exercised.

As to railroads and public carriers the complete list of decisions uniformly sustaining the public right to fix their charges both in State and Federal courts would fill many pages. Enough have been cited to enable the reader to see that the principle is absolutely settled beyond possibility of question and he can trace up other decisions to that effect if so inclined.

In the great case of *People v. Budd*,<sup>1</sup> the highest court of New York, speaking through one of its ablest and purest judges, said: "Society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce under which the carrying trade of the country is to a great extent absorbed by corporations, and as a check upon the greed of these consolidated interests the legislative power of regulation is demanded by imperative public interest. The same principle upon which the control of common carriers rests has enabled the State to regulate in the public interest the charges of telephone and telegraph companies and to make the telephone and telegraph, these important agencies of commerce, subservient to the wants and necessities of society. These regulations in no way interfere with a rational liberty—liberty regulated by law." This decision was affirmed by the Supreme Court of the United States.

**DELEGATION OF POWER.**—The authority of the legislature to empower a railroad commission to prescribe reasonable rates for

<sup>1</sup> 117 N. Y. 22.

common carriers is held constitutional in numerous cases, among them: *R. R. Commission cases*,<sup>1</sup> *Reagan v. Trust Co.*,<sup>2</sup> *State v. Chicago*,<sup>3</sup> *Chicago v. Dey*,<sup>4</sup> *Tilley v. Savannah*,<sup>5</sup> *Clyde v. Railroad*,<sup>6</sup> *Chicago v. Jones*,<sup>7</sup> *Stone v. Railroad*,<sup>8</sup> *Stern v. Natchez*,<sup>9</sup> *McWhorter v. R. Co.*,<sup>10</sup> *Storrs v. Railroad*,<sup>11</sup> *State v. Fremont*,<sup>12</sup> and, in this State, *Express Co. v. Railroad*; and the legislature may prescribe that such rates shall be deemed *prima facie* reasonable.<sup>14</sup>

**JUDICIAL INTERFERENCE.**—The right of the courts to interfere with the rates fixed by the law-making power was denied in *Munn v. Ill.* and several other cases in 94 U. S. and in *Budd v. N. Y.* above cited, but in *Reagan v. Trust Co.*,<sup>15</sup> and *St. Louis v. Gill*,<sup>16</sup> it has been since declared that the fixing and enforcement of unreasonable and unjust rates for railroads was unconstitutional. But just what rates will be considered unreasonable and unjust has not yet been stated by the United States Supreme Court. The discussion in the cases just cited, as well as in others, plainly shows a disposition to interfere and condemn legislative rates only when it is clear that their enforcement amounts to a destruction of the value of the property. In *Munn v. People*,<sup>17</sup> and *Chicago v. Dey*,<sup>18</sup> it was held that rates fixed by legislative authority that will give some compensation, however small, to the owners of railroad property, cannot be held insufficient by the courts. “This rule leaves large power to the legislature and would sanction statutes which would cut down railroad dividends to a mere pittance. Yet it is hard to see how any other rule can be adopted which will not in effect deny the right of the legislature to make regulation of such rates, or else leave little more than the shadow of such power in the legislature while the real

<sup>1</sup> 110 U. S. 307.

<sup>2</sup> 154 U. S. 362, 393.

<sup>3</sup> 38 Minn. 281.

<sup>4</sup> 85 Fed. Rep. 966.

<sup>5</sup> 4 Woods, 449.

<sup>6</sup> 57 Fed. Rep. 436.

<sup>7</sup> 149 Ill. 361.

<sup>8</sup> 62 Miss. 602.

<sup>9</sup> 62 Miss. 646.

<sup>10</sup> 24 Fla. 417.

<sup>11</sup> 29 Fla. 617.

<sup>12</sup> 22 Neb. 313.

<sup>13</sup> 111 N. C. 463.

<sup>14</sup> *State v. Fremont*, *supra*; *Chicago v. Dey*, *supra*.

<sup>15</sup> 154 U. S. 362 and 413.

<sup>16</sup> 156 U. S. 649.

<sup>17</sup> 69 Ill. 80.

<sup>18</sup> 35 Fed. Rep. 866.



power is assumed by the courts." The effect of the reduced rates on the entire line of road is the correct test and not that they are unremunerative on a certain part of the line.<sup>1</sup>

In *Dow v. Beidelman*,<sup>2</sup> it was held that rates which would pay only one and one-half per cent on the original cost of the road were not illegal when the road is held by a reorganized company or its trustees after foreclosure. In *Missouri v. Smith*,<sup>3</sup> it was held that rates sufficient to defray current expenses and repairs and some profit on the reasonable cost of building the road could not be interfered with though they were not high enough to pay interest on all its debts, since they may have been incurred through extravagance or mismanagement.

In *Chicago v. Wellman*,<sup>4</sup> the act of the legislature of Wisconsin fixing railroad fares at two cents per mile was sustained, the court saying that "before the courts would declare such an act unconstitutional because the rates prevented stockholders receiving any dividend or bondholders any interest, the court must be fully advised as to what was done with the earnings, otherwise by exorbitant or unreasonable salaries or in some other improper way the company might tax the public with unreasonable charges. Unless such things are negatived by proof of reasonable salaries and expenses or if the record is silent the legislative rate will be sustained." This is a valuable and noteworthy decision and no judge dissented from so just a ruling. The same principle is reaffirmed in *Reagan v. Trust Co.*<sup>5</sup>

In the most recent case,<sup>6</sup> the court while maintaining that ordinarily the rates must not be such as to leave the owners no profit at all, says: "We could not say that the act was unconstitutional because the company (as is alleged and admitted) could not earn more than four per cent on its capital stock. It cannot be said that a corporation is entitled as of right and without reference to the interest of the public to realize any given per cent on its capital stock. When the question arises whether

<sup>1</sup> *St. Louis v. Gill*, 156 U. S. 649;  
*Missouri v. Smith*, 60 Ark. 221.

<sup>2</sup> 125 U. S. 680.

<sup>3</sup> *Supra*.

<sup>4</sup> 143 U. S. 389.

<sup>5</sup> 154 U. S., at p. 412.

<sup>6</sup> *Livingston v. Sanford*, 164 U. S. 578 (decided December, 1896).

the legislature has exceeded its constitutional power in prescribing the rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored." The court further says that the inquiry as to whether rates are reasonable and just includes whether they are reasonable and just to the public, and adds: "The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. \* \* \* If a corporation cannot maintain such a highway and earn dividends for stockholders it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public."

**CHARTER EXEMPTIONS.**—In *Stone v. Farmers' Co.*<sup>1</sup> it was held (reversing the Supreme Court of Mississippi) and also in *Stone v. Ill.*,<sup>2</sup> that a provision in a railroad charter that "the company may from time to time fix, regulate, and receive the tolls and charges to be received" did not constitute a contract restricting the State from fixing or reducing charges within the limits of its general power to declare what shall be deemed reasonable rates. So a charter provision giving a railroad company "power to charge such sums for transportation of persons and property as shall seem desirable" or "it shall deem reasonable," does not preclude the legislature from prescribing a maximum of charges which it may make.<sup>3</sup> And this is true though the charter expressly gives the corporation power "to fix its own rates," since this is impliedly subject to the legislative power to require them to be reasonable.<sup>4</sup> And the same has been repeatedly held as to gas companies and water companies. A charter giving a railroad the right to fix its rates if not beyond a rate stated in the charter is held not a contract but subject to the legislative power to fix other reasonable rates as a maximum

<sup>1</sup> 116 U. S. 307.

<sup>2</sup> 116 U. S. 349.

<sup>3</sup> *Peik v. Chicago*, 94 U. S. 164; *Chicago v. Ackley*, *Ibid.*; *Stone v. Wis.*, 94 U. S. 181; *Chicago v. Minn.*, 134 U. S. 418; *Ruggles v. Railroad*,

108 U. S. 526; *Laurel Fork v. West Va. Co.*, 25 West Va. 324.

<sup>4</sup> *Railroad v. Miller*, 132 U. S. 75; *Ruggles v. People*, 91 Ill. 256; *Railroad v. People*, 94 Ill. 313; *Wells v. Oregon*, 8 Sawy. 600.

from time to time as money changes in value or operating costs diminish.<sup>1</sup>

The statutory regulation of the rate to be paid for the use of money is another striking instance of legislative authority to regulate rates. And who would contend that the courts have power to intervene and say the legislative rate is too low?

The Supreme Court of the United States has tersely put the true status of railroads thus: "They are chartered and built for public benefit. The pecuniary profit of their owners is purely incidental." Many railroad owners and managers would reverse this if they could, and as far as they are permitted they act upon the maxim: "Railroads are operated for the benefit of their controllers and managers. The public benefit is purely incidental."

The great hindrance to achieving the public benefit which is the legal object for which these corporations are created is the reluctance of their managers to concede reasonable and just rates. Some of them act as if they believed that common carriers were a private business and that they have the right to lay upon the public any rates they think fit to raise money enough to pay whatever salaries they think proper to allow themselves and whatever expenditures they care to make and interest on three or four times the stock and bonds the property really cost. Yet nothing is farther from the law.

Railroad, telegraph, telephone and express companies are *quasi*-public corporations, their charges are in the nature of public taxation, and the public have the right to look into the nature of their expenditures and to fix the rates at a reasonable net profit above economical and necessary disbursements. The public right in this regard is fully shown by the uniform and numerous decisions of the courts already cited. With the enhanced value of money and the corresponding fall in the prices of farm produce and of labor, there should be a corresponding fall in passenger and freight rates. This would conduce to the public benefit and convenience, and would at the same time redound to the benefit of the corporations, which instead of car-

<sup>1</sup> *Georgia v. Smith*, 70 Ga. 694; *Winchester v. Croxton*, 97 Ky. (1896).

rying a few cars half full of passengers or freight, would find it to their benefit as well as that of the public to reduce their rates and carry two or three times the number of cars with full loads. The present charges are often an embargo to travel and traffic alike.

This has been amply shown by experience in those States where the public has succeeded in reducing the rates and by the experience of a line in this State whose receipts nearly doubled during its reduction of rates. Another striking instance is the reduction of postage rates which has always been followed by enormously increased receipts. Indeed the two cents per mile passenger rates already prescribed in so many States and which the people in this State are now demanding is admitted by the corporations here to be just since their reports show that their receipts average  $2\frac{1}{4}$  cents only per mile to each passenger — the enormous addition which makes the charge of  $3\frac{1}{4}$  cents to the public is caused by the immense number of free passes issued to office holders, large shippers and other influential people or favorites — the very people who need them least — but the corporations need their influence to keep the public quiet under exorbitant exactions. Thus in effect, roughly speaking every three passengers who pay  $3\frac{1}{4}$  cents per mile for their own traveling are paying also for the free riding of another, for the railroads carry the dead heads at the expense of the public.

Governor Pingree of Michigan, who has, I believe, won his fight for 3 cents street car fares and 2 cents per mile railroad fares and lower freight rates, in a recent speech in Boston, truthfully said: "Railroad operators are the only men in the country who do not understand that the remedy for short receipts is to lower prices. Yet manufacturers, merchants and everybody else understand this." Railroad men could understand this too, but that they rely on having a monopoly. In 1874 when the legislature of Wisconsin opened the fight for two cents fare and lower freight rates, their action was sustained by the Supreme Court of that State, Chief Justice Ryan delivering a remarkably able opinion, in the course of which he said:<sup>1</sup> "It

<sup>1</sup> Atty.-Genl. v. Railroad, 35 Wis. 583.

may well be that the high rates charged by the railroads have lessened their own receipts by crippling the public interests. The affidavits of experts have been read to the contrary, but they are only opinions, founded indeed on past statistics. Such opinions, founded on such statistics, would have defeated cheap postage and are helping to-day to defeat a moderate tariff. Experience often contradicts such theories. The interest of the public in this regard seems to be identical with that of the railroad. We think that there must be a point where the public interest in railroads and the private interest of the corporators meet, where the service of the public at the lowest practicable rate will produce the largest legitimate income to the railroad. It seems to us an utter delusion that the highest tolls will produce the largest income. The companies have hitherto absolutely controlled their own rates. The legislature now limits them. The companies say the limit is too low. But there is no occasion for heat or passion on either side. The people and the legislature understand well the necessity of railroads to the State and the necessity of dealing fairly and justly and even liberally with the companies."

Indeed the necessity and the benefit of railroads are well understood everywhere. There is no hostility to railroads as such. We want more of them. There is no disposition among any of our people to deal other than liberally with these corporations. There is no desire to fix rates unreasonably low. But we know that rates are often unreasonably high. The control of many great lines is held by non-resident multimillionaires living in London and New York, who occupy to this country the relative position the non-resident English landlords do towards Ireland, and railroad presidents are their bailiffs, and hence these railroads which in the eye of the law "were chartered and built for the public benefit, the pecuniary profit of the owners being incidental only," are now run at "the highest the traffic will bear" for the enrichment of non-residents and with precious little regard to the advantage and betterment of the public. We know the enormous salaries paid its higher officials, who are also provided with sumptuous private palace cars and staffs of servants, private secretaries, lawyers and newspapers at our expense. We

know that all of these expenses come out of the toiling masses from whom they are collected by the station agents as surely and more rigidly than the taxes are collected by the sheriffs and collectors for State and Federal governments. And we know, too, that the public have full power through its representatives to fix every charge made by every railroad in the country.

The Supreme Court of the United States has decided in the cases cited that the public in fixing rates have the right to know the amount of the salaries of railroad officials and the nature of all their disbursements that it may be seen how high it is necessary to fix rates. If the expenditures are extravagant, as for high salaries, or illegal, as for lobby expenses or running newspapers, those items may be disregarded. The public have the same right to be informed as to all these matters as in regard to the salaries and expenses of its State government, for it pays them both equally. The railroad managers need to learn that this is no impertinent curiosity, but that these are matters of legal right, and that their management and rates are of vital interest to the public who pay every expenditure they make. Last winter when a resolution asking information as to the salaries of the higher railroad officials was introduced, in the legislatures of several States, railroad officials and lobbyists affected to treat it as an inquiry into private matters and secured the defeat of the resolutions in nearly, if not every, instance. They knew the investigation would be damning and they dared not let the people know how much they were taxed for railroad salaries and illegal expenses. We know from their own showing that in this State the pro rata part of the salaries on one tolerably short railroad under lease was double that paid by the entire State to the Governor and all the other executive officers of the State government and that the salaries and emoluments of more than one official of corporations operating in this State amount to more than a dozen times what the State pays its Governor, and yet both are paid by the people and come out of their earnings. It will be seen that I have advanced no idea that is not based upon the reiterated decisions of the highest courts in the land. In saying these things I have no desire, whatever, to excite any prejudices against any corporation.

The subject is one of vast, and indeed overwhelming importance. It is of the first consideration that the public shall retain their immemorial right to regulate charges as to all avocations "affected with a public use." That the decisions of the courts reaffirming this right might be collected and ready of access is the object of this article. The great railroads by demanding a pooling bill at the hands of Congress have admitted that competition is at an end. As that safeguard no longer remains for the public it is more than ever essential that we should assert and maintain the protection given the public by its right to regulate charges.

WALTER CLARK.

RALEIGH, N. C.

LAWMAKING.<sup>1</sup>

When I was invited by your association to make the annual address I cast about for a subject that would not only be appropriate to the occasion but would also furnish some practical suggestions in the line of improvement of our systems of jurisprudence. An extended experience by personal participation in legislation according to the American system, has led me to believe that there is no one thing in all the various departments of government or business that is carried on with less scientific or orderly method than the making of laws.

This is not due to the fact that legislation is an obsolete necessity — rarely called for after the centuries of growth and pruning and perfecting through which English law has passed. No age of English or American history has ever seen such activity and profusion in legal enactment as now prevail. With the imperial parliament at Westminster and the Federal Congress at Washington in almost continual session, there are nearly thirty parliaments in the British colonial system and legislatures of forty-five American States holding annual or biennial sessions, all engaged in supplementing and amending the old laws and in devising and passing new ones. Besides these, are countless cities, towns and boroughs, each with a legislative board exercising the power of lawmaking upon many important matters of municipal life and government. The steps of the citizen desiring to walk uprightly are beset with labyrinths of statutory enactments that are intricate and confusing and often so conflicting that he must stumble, turn which way he may. Volume after volume of annual statutes is issued year by year in every State of the Union, so that it is a heavy task for the lawyer to keep familiar with the growing mass of statutory law of his own

<sup>1</sup> The annual address delivered before the American Bar Association at Cleveland, Ohio, on August 26, 1897, by Hon. John W. Griggs, the Governor of New Jersey.



State; and no lawyer who values his reputation would think of giving an opinion upon the law in a sister State unless it might be upon the construction of some one particular statute.

The general statutes of New Jersey comprise three large closely printed volumes and cover more than 3,000 pages. More than half of this body of statutory law has been enacted within the last twenty years.

The legislature of 1895 required a book of over 900 pages to contain its enactments. And it is to be noted that these are almost entirely general laws, the constitution of that State prohibiting the passage of special laws relating to many important and prolific subjects, such as the regulation of internal affairs of counties, cities and townships and the creation of corporations. The same productiveness prevails in other States, in some to a larger and in others to a little less degree.

Wherever legislative bodies assemble, are found exceeding activity and willingness to exercise the fascinating power of law-making. The process of turning a mental conception into a law is so simple and so easy in the ordinary State legislature that laws are losing the sanction of solemnity and moral authority that they once possessed. Besides the spirit of obedience as a patriotic duty, there was in former days a feeling of reverence and awe towards the body of the law as being the embodiment of the wisdom of government inspired by a very high regard for the welfare of society and promulgated only upon most careful and mature consideration. The English race have been taught through centuries to regard human and divine law as closely related in their qualities of solemnity and authority. To them the inspiration and the type have been the law that was given on Mt. Sinai, with the fire that burned upon it, and the thunders and lightnings, and the thick cloud upon the mount, and the voice of the trumpet exceeding loud, and the people standing afar off, awe-struck. "Render unto Cæsar the things that are Cæsar's" is the divine approval under which the Christian world has come to regard the law of the land as possessed of a divine sanction. Law, as thus conceived, is not a thing to be changed with every whim and caprice of popular opinion. If it be, as the subject is taught to regard it, the ex-

pression of a wise and beneficent law-giver, whether prophet, or king, or sovereign people, then it is the product of superior knowledge and wisdom, the best that the heart of man can conceive or his experience suggest. The law-giver who changes his mind with frequency, or is constantly engrafting new limitations upon his code, or trying experiments in government, cannot expect to retain the reverence and respect of his subjects for his wisdom or ability.

Who has not a feeling of admiration for those laws of the Medes and Persians which even the partiality of their king could not change to save a favorite of the court? It stirs our Anglo-Saxon blood with a thrill of pride to read of the sturdy steadfastness of our ancestors at the Parliament of Merton. When urged by the ecclesiastics to adopt the rule of the civil law upon a certain matter, all the earls and barons answered with one voice: "*Nolumus leges Angliæ mutare!*" We will not change the laws of England!

There is nothing so ancient and well approved in our legal system that some one cannot be found to venture an improvement. The most novel and complicated problems are constantly arising from the advancement and development of business and science, or trade and social relations.

Nevertheless, it is true that we have no class of skilled legislators — men trained to construct laws as men are trained in all the arts and professions of the world. Every other department of business, of trade, of art, of commerce, has its skilled and experienced men, its engineers, its electricians, its statisticians, its architects, its designers. If a new railroad is to be built, the best route is carefully chosen, surveys are made, levels are taken, the cost is estimated, the probable traffic computed, all by men trained in such work. If an electric light plant is to be installed, the services of an electrical engineer are called in, and the work is planned and constructed under his scientific and practical guidance. If water-works are projected for a town, the hydraulic engineer first studies the water-shed that is to furnish the supply, measures the flow of the streams, computes the probable consumption of water both for present uses and for long periods of future growth. He plans with scientific pre-

cision the reservoirs, the aqueducts, the system of individual distribution, and every step is taken by his advice and direction. So also if a system of sewerage is to be constructed, the same appropriate direction and advice are employed. If a public library is established, it is chosen, housed, shelved and distributed according to the principles of library practice established and approved by the wisest experts in that department. Men of business enterprise have come universally to recognize that every scheme of construction and development should be undertaken only under the guidance and advice of those whose business it is to furnish expert and professional assistance. In the construction of laws only is this skilled assistance considered unnecessary. We would not dare to build a house, or lay out a landscape, or do any of the ordinary works of construction in social or business life without the assistance of the expert and the specialist.

Interpretation of law is a science; law-making is not. For centuries there has been a lawyer class, whose special study and preparation have been directed to the understanding of the law as it is found, so that they might guide men by their counsel, or speak for them in court, or unravel for them the intricacies of legal systems incomprehensible to the untrained mind of the layman.

Judges construe the law, give it its proper application, say when this or that is within the law or without the law. To prepare one for such judicial service, especial study is deemed essential — *lucubrationes viginti annorum*. There are canons of interpretation by which, in a manner as nearly as may be of the nature of scientific processes, special tests are applied in order to ascertain the intention of the law-maker, the scope of the enactment, its limits and its limitations. Judicial decisions are preserved as matters of value to furnish analogies of reasoning for other cases that come afterwards. The right to act as legal counsel, to represent parties in their legal demands in courts of law, is confined to members of the legal profession, admitted by special license, after due examination as to their learning and capacity, to what we call "the practice of the law."

But when it comes to the very act of making law, all requirements of special study, experience, training and legal insight, are absent. There is no skilled class of legislators, nor is there any school of legislation at which may be learned the theory and practice of constructing a statute.

Generally speaking, statutes are the products of unascertainable authors — children of nobody,— unable to boast of definite parentage. No one certifies to their completeness or accuracy. They are not prepared upon careful plans, submitted and supervised by expert architects of law-building. It is all chance and haphazard; the event must determine whether they are good or bad, whether they express the actual intent of the author or some intent entirely foreign to his will.

The actual practice of our ordinary State legislatures is generally something on this wise: The members of the two houses meet at the time appointed for the convening of the session. The attention of the members is engrossed with matters of a political nature. There is a political majority and a political minority. The choice of officers, from President of the Senate and Speaker of the lower house down to the smallest clerkship, engages the largest interest of the members who are in the political majority. The appointment of standing committees comes next. There is no feature in the process of legislation that should be more potent and useful in the shaping of proposed laws and making them conform to the true standard of accuracy, correct expression and completeness, than the standing committee. The chief interest that it has for the legislature, unfortunately, arises from the influence and power that it can exercise in a political way upon the various subjects that come before it. In most instances there are matters that have been made the objects of campaign discussion and party platform, which obtain the paramount attention of the legislature and obtain the most prominent notice and discussion in the newspapers and among the people. Upon these subjects legislation is undertaken and carried through under the guidance of political leaders, often men of large experience and signal ability. Proposed laws of this kind are subject to careful examination so as to avoid failure from technical defects and to see that no interests are affected except such as

are within the scope of the party plans and purposes. Often the help of able lawyers skilled in the work of drafting and constructing laws is called in by the political managers. Laws passed under this kind of influence are generally what may be called governmental in their character and relate to matters connected with the administration of State affairs or to public policies of unusual importance.

While these things are being transacted by the assembled legislators and engrossing the attention of the public, numerous miscellaneous bills are being introduced from day to day by the members and referred to appropriate committees. Some idea of the variety of measures to be considered may be obtained from the list of committees usually provided for under the rules of an American legislature. At the head of the list usually stands the committee on judiciary; next comes the ways and means committee, which is charged with the supervision of the bills for raising revenue; then the committee on appropriations, which looks after the expenditure of the revenue; then a committee on cities; one on railroads and canals; one on corporations; one on agriculture; one on fisheries; one on commerce and navigation; and committees respectively on insurance, on banking, on labor, on manufactures, on pensions, and finally one on miscellaneous matters. This list gives no adequate idea, however, of the great variety of subjects concerning which somebody has a proposition of statutory change at every legislative session.

The number of distinct legislative propositions submitted in the form of bills at each session of our State legislatures is enormous and is becoming larger every year. The statistics that follow show the extent of this tendency in the legislatures of Massachusetts, New York, New Jersey, Pennsylvania and Illinois, in the present year.

In Massachusetts about 1300 distinct propositions for legislation were before the legislature or its committees. Of these, 628, nearly one-half, became laws.

In New York the bills introduced in the two houses numbered 4533, of which about 1300 were finally passed. Of these, 797 became laws, the remainder of the 1300 passed bills failing to receive the approval of the Governor.

In New Jersey 657 bills were introduced, of which 297 passed both houses, and 207 became laws, 90 failing by reason of executive disapproval, a very marked decrease in the amount of legislation as compared with some previous years.

In Pennsylvania 1566 bills were introduced; 483 were passed by both houses, and about 400 became laws, the rest having been vetoed by the Governor

Illinois has a somewhat better record. There were 1174 bills introduced, and 195 passed, of which, however, only three were vetoed, so that the addition to the statute law of that State comprises only 192 chapters.

I have no means of supplying similar statistics for other States, but think it safe to affirm that the same degree of productiveness will be found in nearly all of them.

These thousands of propositions to alter the law of the land cover almost every conceivable object of government, every department of public and private life; they extend to all kinds of business, to trade, commerce, municipal government, sanitary and police regulations, to the domain of morals as well as to the fields of speculation and political philosophy. Many of them were intended to correct errors in the legislation of the preceding year. Naturally the more careless acts one legislature passes the more blunders there will be for the next one to repair.

There is usually no general scheme of uniform and consistent statutory revision in these masses. They are heterogeneous, often absurdly contradictory, as where one member offered a bill requiring all electric wires to be laid underground within three months after the passage of the bill, and his colleague immediately offered another requiring all electric wires to be elevated at least fifty feet above the surface of the street.

The genesis of these bills, as well as their true purpose, is often covered with obscurity. Some, indeed most, are the products of those especially interested as individuals in securing additional legal powers or privileges for private or business purposes. Many originate from municipalities — not from the general consideration and mature purpose of the people of any city, but out of the opinions and particular ideas of single municipal

officers; and are drawn up by the counsel of the city under the direction of its chief officer or governing body. Many are prepared and urged by members of the legal profession to meet real or supposed difficulties that they have met in cases in their practice. More than one important change in the law of divorce has originated in the desire of some lawyer to bring his client within its favorable conditions.

Other bills are the product of men with peculiar ideas, to whom nothing that is beyond their capacity for improvement, to whom no experience of ages can teach anything who have no respect for stability nor reverence for antiquity. They are the quack doctors of government with cure-alls for every inconvenience of life, no matter what its nature or origin.

Many of these bills, drawn with only one purpose in view by men lacking correctness of legal expression and unlearned as to the whole body of enactments relating to the subject, are unintentionally dangerous and disturbing unless carefully revised and pruned before their passage. They are cast upon the committees in confusing numbers. To revise them all is impossible. If manifestly absurd, they are generally suffered to die without the courtesy of a report or are reported adversely and killed. Some arouse influential hostility from affected interests and succumb to opposition. But under the pressure of the introducer, with his personal pride in the ward of his legislative guardianship, or because no positive evidence of harm appears, or under the processes of logrolling, by which the maxim "one good turn deserves another" is brought to bear upon the function of law-making, many measures that are useless and some that are positively vicious receive the assent of the majority and go to the executive for approval. The practice is to hold these measures back to the closing days of the session, when the attention of the more careful and prudent is relaxed or occupied; then the flood-gates are opened and new laws pour out in a torrent that is terrifying to the careful conservatism of the bar and the courts. It seems that the only remedy for this condition rests in the disapproval of the executive. It is worthy of note that the Governor of New York by withholding his approval put to death about 500 passed bills in the present year. In New Jer-

sey, 90 were similarly disposed of, a smaller number, but in proportion to the number passed, an equal percentage. Yet I doubt if a single reasonable complaint of inconvenience or public loss has been heard by reason of the failure of these 590 bills to become law.

This excessive legislative activity is a feature of our own times. It has developed enormously within a very few recent years. A comparison of the annual volumes of statutes of any particular State for the last twenty years will prove this.

Something of this increase is attributable to the great business development of the times, to the contributions of scientific discovery to the machinery of life.

The common law afforded no principle which by judicial extension could be made to regulate justly the business of telegraphy. City charters contained no provisions under which electric or cable roads could be operated through the streets. To our ancestors came not even a dream that one day the human voice could be heard across thousands of miles of distance.

They had laws to punish witchcraft but none to cover the larceny of telegraph messages by wire-tappers, or the theft of light by illicit connection with an electric circuit. As invention and discovery have added new processes and devices to the tool-shop of civilization, novel adjustments of the laws have been required to regulate the business of the world to the improved conditions.

At the same time there have been commendable movements to restrict the volume of legislation. By constitutional provisions in many States the passage of special laws upon many subjects is forbidden, notably in the matters of granting charters of corporation and the government of cities, counties and other municipal divisions of the State.

Yet the masses of trivial legislation, of statutes uncalled for by any public inconvenience or necessity, go on increasing, confusing the citizen, embarrassing the lawyer and perplexing the courts of justice with contradictions, inconsistencies, dilemmas and floods of verbal turgidity.

Laws enacted one year are repealed the next, to give place to some new conception. The spirit of conservatism dies out in the



fierce unrest of this busy age. Of these multitudinous strivings for change for the mere sake of change in our laws it may be said: "Age cannot wither them, nor custom stale their infinite variety."

The history of the English law reveals change and growth, but growth by slow and deliberate processes; not the quick growth that produces the soft wood of the moist and heated tropics, but the slow accretions by which we obtain the hardy fiber of the oak or the supple strength of the yew, a growth through years of storm and stress, roots deep sunk and sinking ever deeper into the soil, reaching out wider and wider, taking hold of rocks for greater firmness, tops rising ever higher above the undergrowth, with gnarls and knots indeed, but trunks that are sound at heart, and branches broad and green, and sheltering even in storm.

The contemplation of the history of the system of English law which we inherit is to the lawyer a cause of enthusiasm and a lesson in conservatism. To trace the growth of this system from the earliest beginnings, from the protoplasmic cells, so to speak, of village and tribal customs among the primeval fens and forests of Saxony, or the bogs and crags of Jutland, on through centuries of progressive evolution upon English soil and under English skies until we see its mature development in that system of unenacted law which we call common law, is an employment well calculated to arouse the admiration and enthusiasm of the lawyer and statesman as well as of the mere student of history. Modern scholars like Sir Henry Maine, Professor Austin, Doctor Stubbs and Professor Maitland, have done for the history of law what Darwin and his successors have done in the domain of biology. We know from discoveries in natural history how the horse, for instance, by process of evolution has developed from a shape no greater than a fox, with ungulous feet, over vast periods of progression, into the pleohippus of one geological age, the mesohippus of another, and the eohippus of a third, with a gradually increasing size and modifications in form and adaptability until it has attained its perfection in the stately beauty of the barb and the fleetness and docility of the modern racer. Remains of the primeval progenitors of this

genus brought to light by the hand of discovery in bone-caves and geological strata tell the story of its upward tendency through vast periods of geological history.

So have the records of the old Germanic tribes, of their semi-barbarous successors in the conquest of Britain,— of Angles and Saxons and Danes and Franks and Normans, and finally of the composite English race,— records unearthed from the bone-caves of early literature, and from the dust-covered deposits of doom-books, statute rolls, court rolls, pipe rolls, patent rolls, assize rolls and original writs, revealed to us the evolution of the common law from the earliest trivial forms in tribal or village custom through ever advancing and expanding stages of progressive development, with the force of selection and adaptability always at work, until we see it the revered code of life and government for a great enlightened Christian nation, a code so compact with the principles of justice and liberty that it may well evoke the enthusiastic exclamation, “*esto perpetua!*” with which its contemplation inspired the placid pen of Sir William Blackstone.

Not only have laws in the restricted sense as rules of conduct so grown and developed by slow and gradual steps through centuries of national existence, but institutions of government and the machinery of justice have had similar courses of evolutionary development. The courts of chancery and exchequer can be traced back to their beginnings as developments of procedure without warrant of legislative enactment.

The common law is usually conceived to be the collection of rules and customs adopted in actual life among the people of the realm. It would be more correct to regard much of it as the result of judicial procedure and decision. The common law has developed without the pomp of legislative enactment, by the aid of what we know as “legislation by the courts.” It is only necessary to study the history of judicial procedure to understand this. The celebrated work of Bracton, the first comprehensive treatise on English law, is arranged under three heads: (1) Persons, (2) Things, (3) Actions. The relative amount of space required for a statement of the law upon these three heads is represented by the figures 7:91:356. More than three

times as many folios are required to set forth the law of procedure as are needed to state the rights of persons and property. But this is true only in a categorical sense. Professor Maitland points out that Bracton's chapters on the law of actions contain the most important elements of substantive English law, while his treatise on rights partakes more of the nature of a work on speculative jurisprudence. The King's justices always disclaimed the power to make law; they asserted that their function was not to change but to improve — a disclaimer which, fortunately for our jurisprudence, must be disallowed.

In considering the extension and improvement of jurisprudence, we have, therefore, two forces to which we can look,— one the power of direct legislation through constitutional representative assemblies, and the other the power of the courts by decision to extend old principles to new conditions. In the American Republic this latter power is extraordinarily great, because, by the arrangement of our system, the courts are vested with the final decision as to what is law and what is not law, and stands in a sense above the legislature, vested with the right of declaring void and setting aside the statutes passed by the legislature for any violation of constitutional restriction. In all matters, therefore, of constitutional construction and in the extension of constitutional principles by decision, the courts are for the time being supreme. Nor has the process of judicial legislation ceased upon matters other than constitutional. It is still in operation in every court of appellate jurisdiction. We need not lament the fact. The courts are apt to make better laws than the legislatures, not, of course, in those departments of legislation that are administrative or governmental, but upon those subjects of general jurisprudence that form the great body of our substantive law of life, conduct, business, and trade. Judge-made law is apt to be better because it is not violent nor revolutionary, because it is the result of the keenest and best trained thought striving for consistency, uniformity and stability, and is inspired by the principles of justice. The most carefully framed statute is apt to produce confusion, doubt and uncertainty, to the solving of which numerous appeals to judicial interpretation are necessary. One need only look at the cases that have arisen under

the statute of limitations and the statute of frauds to appreciate how difficult it is to draw a comprehensive act which shall be clear in expression and free from doubt in its application.

I have said enough of the prolific tendency to legislate that prevails in our day. It remains to speak of such remedies as can be applied.

It is useless to discuss fundamental changes in the constitution of parliamentary bodies. With all its defects our representative system is the best the brain of man ever devised or his experience worked out.

A lower house with membership frequently changing secures closeness of touch and sympathy with the people. The upper house secures the calmness and deliberation which are essential to guard against sudden and unreasoning popular prejudices, to give stability to our system of law, and in seasons of clamor and unrest to save the people from the folly of their own excitement and emotions.

If representative bodies like our State legislatures are unable to deal with entire success with all the complicated and subtle questions that are presented for their consideration, how much less can it be expected that the masses of the people would be able to do so? Yet, we find some who seriously propose to relegate legislation to the body of the people, and by means of the system known as the *referendum* take the popular voice, not through the people's chosen representatives, but from the direct votes of the people themselves. This is to abandon the system of representative government. Government by representation is a principle derived from the oldest custom of the Anglo-Saxon race. In Hucbald's biography of S. Lebuin, a book written in the tenth century, is found this remarkable passage concerning the Saxons of the eighth century:—

“Once every year at a fixed season, out of each local division and out of the three orders severally, twelve men were elected who, having assembled together in Mid-Saxony near the Weser at a place called Marko, held a common council, deliberating, enacting, and publishing measures of common interest, according to the tenor of a law adopted by themselves.”

Historians of the English constitution trace the existence of

such a representative assembly through all the periods of national existence. Whether the nation be Northumbrian, or Mercian, or East Saxon, or West Saxon, or all united in one English people, there is always the assembly, the council, the witenagemot, the parliament. And this is never a gathering of all the inhabitants, but a meeting of delegates, of men chosen, elected, on account of their prominence or wisdom or influence, to act for their respective constituencies. The witenagemot was what the word signifies — a meeting of the wise men. The system is one of representation, not of pure democracy. Our ancestors were sensible enough to know that the knowledge and temper and deliberation necessary to law-making were not to be found in the assembly of all the citizens. Upon this idea the government of England and her colonies is based. The Federal government of these United States and the government of all the States of the Union are based upon the same principle. To depart from it is impossible. To indulge in the practice of the *referendum*, except upon such matters as constitutional amendments, would tend to destroy confidence in our republican system and produce the highest degree of instability, subjecting the judgment of the uninformed and the passionate for that of the selected and responsible representatives. The operation of this practice is seen in the submission of constitutional amendments to the vote of the people. Very rarely, indeed, can wide popular interest be aroused over such an election; the vote is always light; and the discussion usually is confined to perfunctory newspaper editorials and to those who take unusual interest in public affairs. The masses of the people are very willing to exercise the right of suffrage in the choice of representatives, but in the making of laws and constitutions they are mostly content to confide in the wisdom and work of others. The most pertinent argument against the proposition to establish the system of legislation by the “initiative and *referendum*” is found in the fact that the people do not desire to make their own laws. They want them made by their representatives.

We do not want the system changed; it is only necessary that our legislative bodies shall be controlled, restrained and regulated by a proper sense of the solemnity and responsibility that

pertain to the power they exercise; that they shall learn to respect the wisdom of conservatism, to value stability more than experiment.

The extension of the practice of holding only biennial sessions of State legislatures,—a practice prevalent now in more than thirty States,—will do much to decrease the amount of legislation. It is to be hoped that the system may be extended to other States.

There is room for improvement also in the quality of the men selected as members of the State legislatures. Too much regard is paid to political qualifications and not enough to legislative ability. This is not the fault of the citizens; very often they get the best obtainable. There is a great failure on the part of men who are especially qualified by education and attainments to do their whole duty to the State by serving in the legislative bodies of the State and the city. I have observed that the people prefer to choose high-class public agents when they can get them. But the scholars and lawyers best qualified to guide and restrain legislation very rarely are willing to give their time to public service in the legislature. On rare occasions they will come forth and serve the State with great zeal and benefit; but usually they confine their activity to criticising what less competent men have done. We need a larger contribution of the time and brains of our abler business men and lawyers, both in State legislatures and in the common councils of cities. Their expert knowledge and conservative habits will strike the enacting clause out of many a useless bill that otherwise would drift through on the tide that is more easy to float with than to stem. We need more legislators with moral and legal backbone to stand up against all propositions that lack positive utility.

Public discussion, disclosing the harm that is resulting and must result from excessive and useless legislation, will be useful by awakening public sentiment and extending its influence to the membership of the legislatures.

In this work the Bar, always foremost in all that pertains to good government, can render most valuable service. They perhaps more than any other class are charged with responsibility in this matter; for it pertains directly to their own especial

province. It was with the hope that I might secure the attention of the Bar of America to the reform of this evil—a reform which I have in my official capacity tried to effect in the legislation of my own State,—that I have chosen this subject for your consideration.

In a large degree the faulty construction of our statutes is due to the legal profession; for there is no doubt that they are mostly framed by lawyers. But they are prepared in most instances by attorneys specially employed for particular objects, which being accomplished, little regard is paid to their relation to kindred laws or to their effect upon the general body of jurisprudence. The author of one bill proceeds to make a modification of the law which will effect his client's purpose, and takes no note of any others that may be striving for the amendment of the same law in other respects. So that there is no concert of purpose, no consultation, no consistency in style or in the use of legal expressions. There is needed a higher sense of responsibility among lawyers who engage in the drafting of bills at private solicitation; and there ought to be a more censorious attitude among legislators towards propositions for legislation that emanate from private sources.

I do not wish to enter the controversy which divides the partisans of codification and its opponents. It is a fairly debatable question whether it is better to have the body of the law comprised within a written code, or existing in the infinite mass of common law modified by miscellaneous and occasional statutory amendments. If our command of legal expression were sufficiently complete and precise, our knowledge exhaustive, and our knack of classification equal to that of the scientist, we might safely venture upon the reduction to written statutes of many subjects of general law. But, as has been shrewdly said by Sir Henry Maine, until we can produce a perfect statute, it is idle to expect a complete code. Half of the terror that would be inspired by the rude activity of the legislative propensity of the day is taken away by the reflection that there are few statutes of novel application which will stand the test of judicial criticism.

In this land of written constitutions, the Bar are especially trained in the application of constitutional tests to acts of Con-

gress and statutes of the States. Constitutional and statutory construction engages much of the attention of our courts, and we have developed a fine ability to analyze, compare and apply, as well as to annul, the work of our legislators. It is remarkable, that with this experience and skill in the interpretation of statutes, we have not developed a corresponding proficiency in drafting acts of legislation.

Whatever we may do with reference to codification of general acts, we find it necessary very frequently to codify our statutes. The great number of supplements and amendments that are passed from year to year so obscure the original text that a revision or some similar reduction towards order and simplicity is necessary every few years. In New Jersey, since 1875, there have been four authorized publications of the general laws, under the various titles of "Revision," "Revised Statutes," "Supplement to the Revised Statutes," and "General Statutes." In that period the mass of general statutes has grown from one volume of about 900 pages to the three large octavos containing over 3,000 pages.

At the present time, so great is the dissatisfaction of the Bench and Bar, that special commissions of eminent lawyers have been appointed by the executive under legislative sanction to revise and codify anew the most important titles, with a view of reducing and clarifying the confused mass of enactments that have been piled upon the original text. This service is rendered without compensation out of a sense of public duty, a fact worthy to be recorded to the credit of the Bar of New Jersey. This will serve the double purpose of improving present conditions and warning against further excess. It distinctly recognizes the fact that the help of skilled men working on lines of public and not of private interest must be called in to aid the legislature when accurate and skillful revision is wanted.

If that practice can be extended so as to have every bill receive the careful revision of a trained draftsman, the gain in simplicity, stability and diminution of litigation will be enormous.

It is not to be expected that the high degree of knowledge, skill and care necessary to the revision or codification of any title of the general statutes, can be always obtained among the mem-



bers of a legislature, busy as they generally are with matters of more or less political importance. Such work should be prepared with the thorough-going care and pains that pertain to the library and the study rather than amid the turmoil and excitement of a legislative session. It should be ready in advance of the assembling of the legislature, and carefully compared, revised and considered by several hands. Only a special commission can do this. It is to be noted that Congress has provided for such a commission to revise the criminal and penal statutes of the United States.

A censor of bills is not permissible under our system of legislation, but there can be a rule of public opinion, a sentiment of prudence and conservatism that will enable every legislator to reject all measures not properly revised and corrected, all measures that have no positive public necessity to justify their adoption. It ought not to be enough that a proposed law does no harm; it should be required of it that it shall have the quality of positive benefit in order to justify its enactment.

There are some principles of legislative policy that are so plain and safe that they need only to be stated to be approved.

Make sure that the old law is really deficient. Be careful to consider whether the inconvenience arising from the deficiency of the old law is of enough importance to deserve an act of the legislature to cure it.

Be careful that the remedy be not worse than the disease. Avoid experiments in law-making, especially if recommended by men or parties who are void of knowledge or wanting in respect for established customs.

Do not go on the idea that the world is out of joint and you were born to set it right.

Observe accuracy in the use of language, and avoid the use of ambiguous expressions.

It is one of the just criticisms of our jurisprudence that it has not a technical vocabulary by which legal conceptions can be expressed with as much accuracy as naturalists distinguish genera and species.

This is not a topic that will enlist the enthusiasm of political conventions, or awaken the energies of popular masses. It lacks

the elements that attract those who are fond of exciting and spectacular issues. It belongs to that class of public service that requires infinite pains and infinite patience. It is a contest against an easy-going tendency, not an appeal for some soul-stirring principle of liberty. This reform cannot be demanded at the point of the sword as the barons at Runnymede compelled the granting of the Great Charter. There is no Independence Hall, no Liberty Bell, no Emancipation Proclamation, no loyal sentiment to rally the people. And yet, as Madison said, an irregular and mutable legislation is not more an evil in itself than it is odious to the people.

A realization of this fact will give us legislators more careful to guard against frequent and unnecessary changes. I would I could impress upon the members of the American Bar a deeper sense of the duty they owe to their States in the assumption of political service. There is no higher satisfaction in life than the consciousness of having done one's duty, even though it be in obscure and unnoted service. Such a field is open and the need is urgent. I would not desire to advise any to disregard the ordinary honorable methods of political work through party organizations. The political parties comprise the great mass of the people, and through them the best results can be accomplished. The purely academic citizen never does much but criticise. He does not go down among the masses of the people to learn their habits and thoughts and how they must be managed and taught and led into ways of political sense and wisdom. Yet a system of law in order to be most beneficent must accord with popular common sense. The Athenians intrusted Solon with the sole and absolute power of revising the constitution and laws of Athens, yet he confessed that he had not given to them the laws best suited to their happiness but those most tolerable to their prejudices. Perhaps that is why Solon is known as a very wise man.

This subject is not new to the members of this association; it has been discussed with great ability at former annual meetings. But the quantity of slipshod and unnecessary legislation has gone on increasing. It may be that this evil is like some diseases,—it must get worse before it can get better. Surely, the disease of excessive law-making has reached a degree of

intensity sufficiently bad to justify an expectation of reaction. The disapproval of more than five hundred passed bills by the Governor of one State and of ninety by another in the present year has served to call general attention to the subject in a very marked manner. The creation and maintenance of a strong public sentiment in favor of greater care and conservatism in legislation will tend more powerfully than any other element to check the evil. But that sentiment must be perpetual. More things than liberty are preserved only at the price of eternal vigilance. It is time that universal war should be made by the Bench, the Bar, and all orders of intelligence upon the notion that every misfortune, every inconvenience can be cured by a law. The rules of business, the laws of trade, the operations of natural laws and processes, the qualities of human nature, the recurrence of the seasons, misfortune, sickness, death, the ten commandments,—all these and many others are beyond the proper realm of legislative dabbling; yet many people seem to think that a simple act of Congress or of a State legislature can change them all.

Let us continue our labors for uniformity of law upon proper topics, for simplicity of procedure, for better legal education, for international arbitration; and at the same time let us strive to increase the spirit of careful conservatism which is the best preservative of good, to cry a continual alarm against trifling with the deep-laid foundations of our jurisprudence, and to preserve for our laws that sentiment of reverence and respect which hitherto has so distinguished the Anglo-Saxon race.

## THE FEDERAL ANTI-TRUST LAW AND ITS JUDICIAL CONSTRUCTION.<sup>1</sup>

*To the American Bar Association:*

The Committee on Jurisprudence and Law Reform beg leave to present the following report:—

At the meeting of the association at Saratoga in August, 1894, the following resolution was adopted:—

“*Resolved*, That the Committee on Jurisprudence and Law Reform be requested to submit to the association at its next annual meeting a report comprising, first, a succinct history of the operation to date of the act of Congress commonly known as the Anti-Trust law, with such comments on its success and usefulness as seem to be pertinent; and, second, if it is believed by the committee that any additional legislation within the constitutional power of Congress would increase the effectiveness of the act or improve modes of procedure under it, such suggestion as shall seem to them advisable on that subject.”

No report has yet been made by our predecessors upon this committee, and we deem it proper, therefore, to take up the question in the light of recent history.

As a matter of convenience we copy the act in question, 26 U. S. Statutes at Large, p. 209:—

“CHAP. 647. AN ACT TO PROTECT TRADE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES.

“*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

“SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby

<sup>1</sup> Report of the Committee on Jurisprudence and Law Reform, presented to the American Bar Association, at Cleveland, Ohio, August 25, 1897.

declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

“SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

“SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce, in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

“SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the

hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

“SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

“SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

“SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of any thing forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

“SEC 8. That the word ‘person’ or ‘persons,’ wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

“Approved, July 2, 1890.”

## I.

We may first notice the line of decisions which have been made in cases where it has been sought to apply the prohibitions

of this statute to the organization or conduct of manufacturing and commercial enterprises in the several States.

In the case of the American Biscuit Company *v.* Klotz,<sup>1</sup> the Circuit Court of the United States for the Eastern District of Louisiana, Pardee and Billings, JJ., cited the statute in question, and declined to appoint a receiver on the prayer of the plaintiff company, which appeared to the court to be a monopoly of thirty-five bakeries in twelve different States. This refusal to appoint seems to have been based on the doctrine that the court had a sound discretion in the premises, and did not care to exercise its power in such a case.

In the case *In re Greene*,<sup>2</sup> which came up before Mr. Justice Jackson at Circuit, Greene applied, in Ohio, for a writ of *habeas corpus* to release him from the custody of the United States marshal, by whom he was held under a warrant of a United States commissioner, awaiting an order for his removal to the District of Massachusetts, to answer an indictment for an alleged violation of the act in question. Mr. Justice Jackson held that Congress did not intend by this statute to declare that the acquisition by a State corporation, known as the Distilling and Cattle Feeding Company, of so large a part of any species of property as to enable the owners to control the traffic therein among the several States, constituted a criminal offense: and the conclusion was that the allegations of the indictment, as to fixing price, and as to monopoly and restraint of trade, were insufficient, and petitioner was discharged.

In *Dueber Watch Case Manufacturing Company v. E. Howard Watch & Clock Co.*<sup>3</sup> the action was to recover damages alleged to have been caused by acts done in violation of the statute we are now considering, and it was held by Judge Coxe, sitting in the Circuit Court for the Southern District of New York, that the action could not be maintained when the complaint failed to show that the plaintiff was engaged in interstate commerce; and that no such showing was made by an averment that plaintiff was engaged in manufacturing watch cases throughout all the States of the United States and in foreign countries. It was further

<sup>1</sup> 44 Fed. Rep. 72.

<sup>2</sup> 52 Fed. Rep. 104.

<sup>3</sup> 55 Fed. Rep. 851.

held that an agreement by a number of manufacturers and dealers in watch cases, to fix an arbitrary price on their goods, and not to sell the same to any persons buying watch cases of plaintiff, was not in violation of the statute; and a complaint which avers only these facts, without averring the absorption of, or the intention to absorb or control the entire market, or a large part hereof, states no cause of action.

After some further proceedings this cause went to the Circuit Court of Appeals,<sup>1</sup> where the views of the lower court were sustained, Wallace J., dissenting.

In *United States v. Patterson*,<sup>2</sup> it was held by Judge Putnam, in the Circuit Court for the District of Massachusetts, considering an indictment under this statute for restraint of trade among the several States, and monopolizing the same, that in an indictment under this act it is not sufficient to declare in the words of the statute, but the means used must be set out, so as to enable the court to see that they are illegal. It was further held that the words, "Trade and Commerce," as used in the act, are synonymous; that the use of both terms in the first section does not enlarge the meaning of the statute beyond that employed in the common law expression, "contract in restraint of trade," as they are analogous to the word monopolies used in the second section of the act; that this word is the basis and limitation of the statute, and hence, an indictment must show a conspiracy, in restraint, by engrossing or monopolizing or grasping the market; and it was not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation or otherwise.

In same case,<sup>3</sup> further rulings were made, which, however, do not seem to throw light upon the questions in hand in this report.

In *United States v. E. C. Knight Co.*,<sup>4</sup> it was held by Judge Butler, sitting in the Circuit Court for the Eastern District of Pennsylvania, that a combination, whose object is to enable a single company to monopolize and control the business of refin-

<sup>1</sup> 66 Fed. Rep. 637.

<sup>2</sup> 55 Fed. Rep. 605.

<sup>3</sup> 59 Fed. Rep. 280.

<sup>4</sup> 60 Fed. Rep. 306.



ing and selling sugar, by buying up all competing concerns in the United States, is not in violation of this statute, for it constitutes no restriction upon or monopoly of commerce between the States, but at most only makes it possible for the promoters of the combination to restrict or monopolize such commerce should they so desire. This case being taken by appeal to the Circuit Court of Appeals for the Third Circuit, the decision was affirmed, and reference was made to the decision of Justice Jackson in the case of *Greene*, cited above. The case having been further taken by appeal to the Supreme Court of the United States, was again affirmed,<sup>1</sup> it being held that the monopoly and restraint denounced by the act are the monopoly and restraint of interstate and international trade and commerce, and not a monopoly in the manufacture of a necessity of life, as assumed on the record.

We presume it may be considered as settled that the purchase of sugar refineries in different States of the country, or the purchase of stock in the companies operating such establishments, in such a way as to largely control this special manufacture, does not essentially involve a monopoly or restraint of interstate or international commerce within the meaning of the statute now under consideration.

In *Pidock v. Harrington*,<sup>2</sup> a suit in equity was brought against a number of defendants, praying for an injunction and an accounting, on the ground that the defendants had conspired to ruin complainant's business as a commission merchant and dealer in live stock. The action was based upon the act of Congress now in question. Judge Coxe, in sustaining a demurrer, agreed with the decision in *Blindell v. Hagan*,<sup>3</sup> to the effect that a suit in equity of this kind could only be brought by the United States.

In *Lowenstein v. Evans*,<sup>4</sup> it was held by Judge Simonton that the act of Congress in question is not applicable to the case of a State which by its law assumes an entire monopoly of the traffic in intoxicating liquors, a State being neither a person nor a corporation within the meaning of the act of Congress.

<sup>1</sup> 156 U. S. 1.

<sup>2</sup> 64 Fed. Rep. 821.

<sup>3</sup> 54 Fed. Rep. 40.

<sup>4</sup> 69 Fed. Rep. 906.

In the admiralty case of *The Charles E. Wisewall*,<sup>1</sup> Judge Coxe held that one who requests and accepts the services of a tug for towing purposes, cannot escape paying the reasonable value of the services rendered, on the ground that the tug owners are members of an association which was claimed to be illegal and void under the act of July 2d, 1890. The learned judge remarked, that "the courts have found it very difficult to apply the indefinite generalities of this act to the facts of any given case."

In *Greer v. Stoller*,<sup>2</sup> it was held by Judge Philips, that a bill by members of a business exchange to enjoin the board of directors from enforcing against them certain by-laws of the association, on the ground that the same are illegal, as being in restraint of trade and commerce, cannot be based upon the act of Congress of July 2d, 1890; the right to bring a suit for injunction being limited in that statute to actions on behalf of the government.

In *U. S. v. Addyston Pipe Company*,<sup>3</sup> Judge Clark pointed out that the act of Congress in question does not and cannot affect any monopoly or contract in restraint of trade, unless it interferes directly and substantially with interstate commerce or commerce with foreign nations. The learned judge further pointed out, that in a suit under this statute by the United States, the court is not concerned with any case between private persons or corporations where the jurisdiction would depend on other circumstances. He further held that where several corporations engaged in the manufacture of cast iron pipe, form an association, whereby they agree not to compete with each other in regard to work done or pipe furnished in certain States and Territories, and, to make effectual the objects of the association, agreed to charge a bonus upon all work done and pipe furnished within those States and Territories, which bonus was to be added to the real market price of the pipe sold by those companies, such a combination was not a violation of the act of Congress in question, as it affected interstate commerce only incidentally.

<sup>1</sup> 74 Fed. Rep. 802.

<sup>3</sup> 78 Fed Rep. 712.

<sup>2</sup> 77 Fed. Rep. 1.

## II.

We may next consider the line of decisions in which the application of this statute has been considered in cases of strikes, boycotts and other labor troubles.

In *Blindell v. Hagan*, cited above,<sup>1</sup> the complaint was of a combination to unlawfully prevent the shipping of a crew for a vessel plying between New Orleans and Liverpool.

The court had jurisdiction by reason of citizenship, the complainants being aliens and the defendants citizens of the State of Louisiana. The injunction was granted by the late Judge Billings under this jurisdiction, to prevent an unlawful and injurious interference with the business of the complainants. The injunction had also been claimed under the provisions of the act of Congress in question, but the learned judge remarked in regard to this point as follows:—

“The injunction has been asked for, first, under the act of 1890, 26 Statutes at Large, p. 209, known as an act to protect trade and commerce against unlawful restraints and monopolies. This act makes all combinations in restraints of trade or commerce unlawful [referring, doubtless, to interstate or international commerce], and punishes by fine or imprisonment, and authorizes suits for triple damages for its violation; but it gives no new right to bring a suit in equity, and a careful study of the act has brought me to the conclusion that suits in equity or injunction suits by any other than the government of the United States, are not authorized by it.”

This decision of Judge Billings was affirmed by the Circuit Court of Appeals, same case,<sup>2</sup> in which the decision of the lower judge was sustained for the reasons given in its opinion. We may conclude, therefore, that, so far as this decision may settle the question, the act of Congress in question does not undertake to confer any right upon any litigant except the United States to file a proceeding for an injunction.

The next case in order of time in which the statute in question appears to have been passed upon, is that of the United States

<sup>1</sup> 54 Fed. Rep. 40.

<sup>2</sup> 56 Fed. Rep. 696.

v. The Workingmen's Amalgamated Council and others,<sup>1</sup> where Judge Billings held that an injunction would lie, under the provisions of this act, against a large number of labor associations, whose combination and strike, and whose unlawful acts, in pursuance of this combination, had paralyzed the interstate and international commerce of New Orleans.

In view of the recent decision of the Supreme Court of the United States in the case of *Trans-Missouri Traffic Association*,<sup>2</sup> it may be interesting to quote a few words from the opinion of Judge Billings.<sup>3</sup> It does not seem to have occurred to Judge Billings that the restraint of trade mentioned in the act of Congress of 1890 applied to lawful restraint as well as unlawful. After reciting the peculiar facts before him, the learned judge said:—

“The question simply is, do these facts establish a case within the statute? It seems to me this question is tantamount to the question, could there be a case under the statute? It is conceded that the labor organizations were at the outset lawful. But when lawful forces are put into unlawful channels, *i. e.*, when lawful associations adopt and further unlawful purposes and do unlawful acts, the associations themselves become unlawful. The evil, as well as the unlawfulness, of the act of the defendants, consists in this: that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country. What is meant by ‘restraint of trade’ is well defined by Chief Justice Savage in *People v. Fisher*.<sup>4</sup> He says:—

“‘The mechanic is not obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair; but he has no right to say that no other mechanic shall make them for less. Should the journeymen bakers refuse to work unless for enormous wages, which the master bakers could not afford to pay, and should they compel all journeymen in the city to stop work, the whole population must be without bread; so of journeymen tailors or

<sup>1</sup> 54 Fed. Rep. 994.

<sup>2</sup> 166 U. S. 290.

<sup>3</sup> 54 Fed. Rep. 1000.

<sup>4</sup> 14 Wend. 18.

mechanics of any description. Such combinations would be productive of derangement and confusion, which certainly must be injurious to the trade.' ”

“It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, in which the court finds their error and their violation of the statute. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other lawful business within the city as well.

“For these reasons I think the injunction should issue.”

This decision was affirmed by the Circuit Court of Appeals for the Fifth Circuit, and the opinion is reported in the case of the Workingmen's Amalgamated Council of New Orleans v. United States.<sup>1</sup> In its decision the Appellate Court held that the bill exhibited was clearly within the act of 1890, although it did not think it necessary to anticipate the further progress and final hearing of the case by an expression of views “as to the full scope and sound construction of this recent and important statute.”

In *Waterhouse v. Comer*,<sup>2</sup> Judge Spear, of the Southern District of Georgia, remarked, that a rule of the Brotherhood of Locomotive Engineers, there considered, was a rule or agreement in restraint of trade or commerce, which would, if enforced, violate the act of Congress of July 2, 1890, known as the “Sherman Anti-Trust Law.”

In *United States v. Patterson*,<sup>3</sup> already cited, Judge Putnam, of the Second Circuit, expressed the opinion, by way of illustration simply, that Congress did not intend, by this act of 1890, to extend the jurisdiction of the courts of the United States to strikes or boycotts which might interfere with interstate or international commerce by violence or intimidation. It may be suggested, however, that this expression of Judge Putnam's views, *arguendo*, was not intended to amount to a decision of

<sup>1</sup> 57 Fed. Rep. 85.

<sup>2</sup> 55 Fed. Rep. 149.

<sup>3</sup> 55 Fed. Rep. 605.

that special question, and in any event it may be considered as overruled.

In *United States v. Elliott*,<sup>1</sup> Judge Thayer granted an injunction against certain persons claiming to be a labor organization, and who appeared to be conspiring to impede interstate commerce; and in the same case,<sup>2</sup> the demurrer was overruled by Judge Philips of the Western District of Missouri.

In *Thomas v. Cincinnati &c. Railway Co.*,<sup>3</sup> one Phelan was punished for contempt for violating an injunction, and the act of Congress in question was cited in support of the proposition that the acts of Phelan had been unlawful. The opinion, which was delivered by Judge Taft, seems to have been concurred in by Judge Lurton, and both judges appeared to have agreed in doubting the correctness of Judge Putnam's dictum in the case of *Patterson*, already alluded to.

The ruling that a labor combination to paralyze interstate commerce is unlawful under the act of Congress which we are now discussing, was also made by Judge Baker sitting in the Circuit Court for the District of Indiana, in the case of the *United States v. Agler*,<sup>4</sup> by Judge Grosscup of the Northern District of Illinois in a charge to the grand jury,<sup>5</sup> and by Judge Morrow of the Northern District of California, in a similar charge.<sup>6</sup>

In *United States v. Debs*,<sup>7</sup> two proceedings were taken up together for violation of injunctions which had been issued, the one on complaint of the United States, and the other on the petition of the receivers of a railway company, and the parties thus proceeded against were sentenced to imprisonment, Judge Woods holding that the act of July 2, 1890, applied to the questions involved, and could thus be enforced.

This decision, so far as the case of the United States was concerned, was brought before the Supreme Court of the United States by an application for a writ of *habeas corpus*, and the decision upon this application is found in the case *In re Debs*, petitioner, original.<sup>8</sup> In refusing the application, the Supreme

<sup>1</sup> 62 Fed. Rep. 801.

<sup>2</sup> 64 Fed. Rep. 27.

<sup>3</sup> 62 Fed. 803.

<sup>4</sup> 62 Fed. Rep. 824.

<sup>5</sup> 62 Fed. Rep., p. 828.

<sup>6</sup> 62 Fed. Rep., p. 840.

<sup>7</sup> 64 Fed. Rep. 724.

<sup>8</sup> 158 U. S. 564.

Court based its decision upon the general competency of the government to prevent the obstruction of interstate commerce, or the carrying of mails, and did not pass directly upon the effect of the act of July 2, 1890. Concerning this matter, the language of the court is as follows:—

“We enter into no examination of the Act of July 2, 1890,<sup>1</sup> upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this, that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed.”

In *United States v. Cassidy*,<sup>2</sup> Judge Morrow, of the Northern District of California, in a charge to the jury, applied the prohibitions of the act of July 2, 1890, to a combination or conspiracy of strikers to interrupt and restrain interstate commerce.

### III.

We may now consider the interpretation of the act as applied to the business of transportation and especially by railway companies.

In *United States v. Trans-Missouri Freight Association*,<sup>3</sup> the Circuit Court of Appeals for the Eighth Circuit, affirming the Circuit Court, held, in the matter of the agreement under consideration, that the act of Congress of July 2, 1890, must be read in the light of general laws in force at the time of its enactment; that where Congress adopts or creates a common law offense, and in doing so uses terms which have acquired a well understood meaning by judicial interpretation, the presumption is that the terms were used in that sense; that courts may properly look to prior decisions interpreting them for the meaning of the terms, and the definition of the offense, where there is no other definition in the act; and that, therefore, the contracts, combinations in the form of trusts or otherwise, and conspiracies

<sup>1</sup> Ch. 647, 26th Stat. 209.

<sup>2</sup> 586 Fed. Rep. 58.

<sup>3</sup> 67 Fed. Rep. 698.

in restraint of trade declared to be illegal by the act in question with respect to interstate and international commerce, are the contracts, combinations and conspiracies in restraint of trade that had been declared by the courts to be against public policy and void under the common law before the passage of this act of 1890.

The court further declared that the test of the validity of such contracts or combinations is not the existence of restriction upon competition imposed thereby, but the reasonableness of that restriction under the facts and circumstances of each particular case. If, therefore, the contract or combination appears to have been made for a just and honest purpose and the restraint upon trade is not specially injurious to the public, and is not greater than required for the protection of the legitimate interest of the party in whose favor the restraint is imposed, the contract or combination is not illegal.

The traffic agreement in question in that case was held to be a reasonable one. The decision was rendered by Judge Sanborn, with whom Judge Thayer concurred, while Judge O. P. Shiras, of the Northern District of Iowa, dissented. The case was taken to the Supreme Court of the United States, and became the subject of animated discussion and dissent. Five judges of that learned tribunal united in an opinion reversing the decrees of the Circuit Court of Appeals, and of the Circuit Court for the District of Kansas, in which the case originated.

The main point of the decision thus rendered by the majority of the court is, that the prohibitory provisions of the act of July 2, 1890, apply to all contracts in restraint of interstate or foreign trade or commerce, without exception or limitation, and are not confined to those in which the restraint is unreasonable. The doctrine thus formulated was vigorously combated in the dissenting opinion of Mr. Justice White, with whom concurred Mr. Justice Field, Mr. Justice Gray and Mr. Justice Shiras.

It is stated in the dissenting opinion, page 344, that two propositions were conceded in the case by the majority of the court, as well as by the minority, "one of law and the other of fact: first, that only such contracts as unreasonably restrain trade are



violative of the general law; and, second, that the particular contract here under consideration is reasonable, and, therefore, not unlawful, if the general principles of law are to be applied to it."

The dissenting opinion then proceeds to argue that the act of Congress in question is declared by its title to be an act to protect trade and commerce against unlawful restraints and monopolies, and that the intention of Congress must have been to prohibit only such contracts in restraint of trade or commerce as were considered unreasonable at common law, thus applying the doctrine of the common law to interstate or international trade or commerce.

An elaborate argument for a rehearing was presented to the court, but a rehearing was refused.

In *Prescott & Arizona Central Railroad Company v. Atchison, &c. Railroad Co.*,<sup>1</sup> it was held by Judge Lacombe, of the Second Circuit, that a contract by which a railroad company arranges with another to the exclusion of still others for the interchange of passengers and freight by through tickets and bills of lading, is not a contract in unlawful restraint of trade within the meaning of the act of Congress of July 2, 1890. The contract concerned interstate business, and the learned judge followed the decision in the case of the *Trans-Missouri Freight Association* by the Circuit Court of Appeals. The decision of the Supreme Court, alluded to above, had not then been rendered.

In the case of *United States v. Joint Traffic Association*,<sup>2</sup> Judge Wheeler, of the District of Vermont, sitting in New York, held that a combination of railroad companies into joint traffic associations, under articles of agreement by which each road carries the freight each may get over its own line, at its own rate and has the earnings to itself, though providing proportional rates or proportional division of traffic, is not in violation of the act of 1890 against unlawful restraints and monopolies. This decision was also rendered before the decision of the Supreme Court, above cited.

<sup>1</sup> 73 Fed. Rep. 438.

<sup>2</sup> 76 Fed. Rep. 895.

## IV.

It may not be considered irrelevant to refer in passing to sections 73 to 77, inclusive, of the Tariff Bill of August 27th, 1894.<sup>1</sup> By section 73 it is provided "that every combination, conspiracy, trust, agreement or contract is hereby declared to be contrary to public policy, illegal and void, when the same is made by or between two or more persons or corporations, either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, agreement or contract is intended to operate in restraint of *lawful* trade or free competition in *lawful* trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States; or of any manufacture into which said article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this act, or who shall combine or conspire with another to violate the same is guilty of a misdemeanor, and on conviction thereof in any court of the United States, such person shall be fined in a sum not less than \$100 and not exceeding \$5,000, and shall be further punished by imprisonment in the discretion of the court for a term not less than three months, nor exceeding twelve months."

By the following sections above cited, jurisdiction is conferred on the several Circuit Courts of the United States to prevent and restrain violations of section 73; and provision is made for the forfeiture of property owned under any prohibited contract or combination; and suits are allowed in the Circuit Court by any person injured by reason of anything forbidden or declared unlawful by the act.

We merely refer to these provisions in passing. We do not undertake to give them any interpretation, and we do not find that the courts have as yet passed upon their meaning. At the time this report is in course of preparation it seems probable

<sup>1</sup> 28th Statutes at Large, Chap. 349.

that similar provisions may be enacted in the tariff act of 1897.

We also submit, as an appendix of this report, a letter of the Attorney-General of the United States, of February 8, 1896, addressed to the House of Representatives concerning the act of July 2, 1890. It contains a number of interesting suggestions.

## V.

Having thus referred to leading decisions under the act of Congress of July 2, 1890, we deem it proper to say that there remains an important constitutional question, in this connection, which has not been determined, and may well be discussed by the members of this association. One of our learned brethren of the Bar of New York<sup>1</sup> has lately published a pamphlet devoted to the contention that, if the views of the majority of the Supreme Court in the case of the Trans-Missouri Association be correct, it must logically follow that the act of July 2, 1890, is unconstitutional, in this, that it violates the Fifth Amendment of the constitution of the United States, which declares that "no person shall be deprived of life, liberty or property without due process of law."

This provision applies to the Congress of the United States; and the main point of the pamphlet to which we now refer is, that if it be true that the Congress has prohibited all contracts in restraint of interstate and foreign trade, whether reasonable or unreasonable — in other words, has prohibited those that were and are reasonable — it has exceeded its powers; it has exercised the right to regulate so as to destroy, and has deprived all persons in interest of property and property rights in violation of the Fifth Amendment.

A possible case might be suggested in this connection. A private person, during the past twenty years, has built up a large interstate business between Cleveland and Kansas City. Its good-will alone is of great and real value. He desires to sell out. He is willing to bind himself not to carry on the business with

<sup>1</sup> Mr. W. D. Guthrie.

such reasonable limits as would conform to the rules laid down in the general law, and recognized by such decisions as *Oregon Steam Navigation Co. v. Winsor*.<sup>1</sup>

In that case the court, speaking through Mr. Justice Bradley, declared it to be "well settled that a stipulation by a vendee of any trade, business or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment, within a reasonable distance so as not to interfere with the value of the trade, business or thing purchased, is reasonable and valid."

\* \* \* \* \*

"A stipulation is unobjectionable and binding which imposes the restraint only to such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions."

Now, if the person we have imagined could not lawfully sell the good-will of such a business, with the usual and reasonable stipulation referred to by Mr. Justice Bradley, because the act of July 2, 1890, denounces such a contract of sale as a crime, may it not be that the trouble is with the statute, and not with the contract? Is it not possible that the statute is violative of the Fifth Amendment, in that it would deprive the supposed person of a valuable right of property acquired in the course of a successful industry?

We do not undertake to answer these questions. We think it would be within the spirit of the resolution to submit them to the association for such discussion as may seem proper. And we apprehend that such a discussion might fully satisfy the purposes of the resolution.

WM. WIRT HOWE,  
MOORFIELD STOREY,  
J. M. DICKINSON,  
SAMUEL F. HUNT,  
U. M. ROSE.

<sup>1</sup> 20 Wallace, 64.

## APPENDIX.

54th Congress, }  
1st Session. }

HOUSE OF REPRESENTATIVES.

{ Document  
{ No. 234.

DEPARTMENT OF JUSTICE,  
*Washington, D. C., February 8, 1896.*

## THE HOUSE OF REPRESENTATIVES:

In compliance with the resolution of the House of Representatives of January 7, 1896, requesting me to report what steps, if any, I have taken to enforce the law of the United States against trusts, combinations and conspiracies in restraint of trade and commerce, and what further legislation, if any, is needed, in my opinion, to protect the people against the same, I have the honor to say:—

(1) Many complaints have been made against alleged trusts, combinations and monopolies, which, in so far as they appeared to relate to matters within the jurisdiction of the Federal government, I have endeavored to investigate as well as the means at my disposal permitted. Some such investigations are now in progress.

(2) Two actions are now pending, based partly or wholly on alleged violations of what is known as the Sherman Act. They both relate to agreements among interstate carriers.

(3) The question, "What further legislation is needed to protect the people?" is one of general policy and not one of law, which, therefore, does not pertain to my department. I assume, however, that Congress merely desires me to point out such defects in the present law as experience has shown to exist. I accordingly submit the following suggestions:—

(a) The act of July 2, 1890, commonly called the Sherman anti-trust law, as construed by the Supreme Court,<sup>1</sup> does not apply to the most complete monopolies acquired by unlawful combination of concerns which are naturally competitive, though they, in fact, control the markets of the entire country, if engaging in interstate commerce be merely one of the incidents of their business and not its direct and immediate object. The virtual effect of this is to exclude from the operation of the law manufacturers and producers of every class, and probably importers also.

As a matter of fact, no attempt to secure monopoly or restrain trade and commerce could possibly succeed without extending itself largely,

<sup>1</sup> See page 18 of my annual report.

if not entirely, over the country ; so that while engaging in interstate commerce may not be the direct or immediate object, it is a necessary step in all such undertakings. While Congress has no authority in the matter, except what is derived from its power to regulate commerce, the State alone having general power to prevent and punish such commercial combinations and conspiracies, Congress may make it unlawful to ship from one State to another, in carrying out or attempting to carry out the designs of such organizations, articles produced, owned or controlled by them or any of their members or agents.

The limitation of the present law enables those engaged in such attempts to escape from both State and Federal governments, the former having no authority over interstate commerce and the latter having authority over nothing else. By supplementing State action in the way just suggested Congress can, in my opinion, accomplish the professed object of the present law.

(b) Several of the Circuit Courts have held that the act of July 2, 1890, which used general terms, with no attempt to define them, made nothing unlawful which was not unlawful before, but merely provided punishment for such agreements and conspiracies against trade and commerce as the courts, by the rules of the common law, have always refused to enforce between the parties. The result has been great doubt and uncertainty and the failure of the law to accomplish its purpose.

If it is proposed to persist in that purpose, I suggest an amendment which shall leave no doubt about what is meant by monopolies, by attempting to monopolize, and by contracts, combinations and conspiracies in restraint of trade and commerce.

It should not be difficult to distinguish legitimate business enterprises carried on by individuals or by associations of individuals in bona fide partnerships and corporations, however great and successful they may become by superior capacity, facilities or enterprise, from combinations of rival concerns, no matter under what form or disguise, whose object is to stifle competition and thereby secure illicit control of the markets. The real nature and design of the organization would always be a question of fact. The courts have no difficulty in deciding this question when it arises between the parties. They would have none in deciding it as between the government and the parties.

(c) The present law should contain a provision like that of the interstate commerce law, to prevent the refusal of witnesses to answer on the ground of self-incrimination. This defect had been severely felt in all attempts to enforce the law.

The sufficiency of this feature of the interstate commerce law is involved in a case recently argued and submitted to the Supreme Court, which will probably be decided during the present session of Congress. If the decision be in favor of the government, a similar clause should be added to the present law against monopolies, etc.

I also suggest the propriety of making the penalties of the law applicable only to general officers, managers and agents, and not to subordinates. The latter could not then decline to testify, and sufficient evidence can easily be obtained from them.

The difficulty of obtaining proof, on account of the cause just mentioned, might also be diminished, if not removed, by enacting as a rule of evidence that the purchase or combination in any form of enterprises in different States, which were competitive before such purchase or combination, should be *prima facie* evidence of an attempt to monopolize. This would put the parties to the necessity of explanation which would supply the information desired.

A similar provision should be made with respect to well-known methods of doing business throughout the country which are designed to deprive dealers of liberty of trade and compel them to become instruments of commercial conspirators.

The adoption of such a rule of evidence might give life to section 7 of the present law, which permits civil actions for damages caused by such unlawful combinations and conspiracies. It is believed that difficulty of proof has been the chief reason why this section has been so nearly a dead letter.

(d) If the Department of Justice is expected to conduct investigations of alleged violations of the present law or of the law as it may be amended, it must be provided with a liberal appropriation and a force properly selected and organized. The present appropriation for the detection of crimes and offenses is very small and the time of the examiners is fully occupied by the present important duties assigned to them. It is well known that while it is quite easy to detect and prove combinations of workmen because of their large numbers and the methods which they necessarily adopt, time, care and skill are required to obtain legal proof of combinations and conspiracies among producers and dealers who are a few in number and able to resort to skillful and secret methods.

But I respectfully submit that the general policy which has hitherto been pursued of confining this department very closely to court work is a wise one, and that the duty of detecting offenses and furnishing evidence thereof should be committed to some other department or bureau.

With a view to the efficient discharge of this duty, whoever may be charged with it, the law should provide, as the interstate commerce law does, for compelling witnesses to attend and testify before the investigating officer.

Very respectfully,

JUDSON HARMON,  
Attorney-General.



## NOTES.

**TAXING LIFE INSURANCE POLICIES.** — The State Board of Tax Commissioners of Indiana lately resorted to the novel scheme of laying a tax on life insurance policies. An action was brought by John H. Holiday and others to restrain them from enforcing this tax. It was heard before Judge Allen of the Marion County Circuit Court (Indianapolis) and an injunction was granted.

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**JOHN RANDOLPH TUCKER MEMORIAL HALL.** — The Alumnae Association of Washington and Lee University of Virginia has started a subscription for the erection of a handsome building to be known as the "John Randolph Tucker Memorial Hall," which is to be a memorial to the late Mr. Tucker at the home of the law school over which he presided, with distinction, for many years. Subscriptions from the legal profession, however small, are invited, and should be addressed to "Hon. H. St. George Tucker, Staunton, Va."

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**COMPENSATION OF BEGINNERS AT THE LAW.** — Irving Browne in one of his letters to the *Law Journal* (London) says: —

In my last letter I spoke of some of the crowded law schools in these States. As a significant commentary on this subject let me draw attention to several advertisements in a recent New York legal newspaper. An attorney fifteen years in practice, desires a position as managing clerk or assistant on trials, and will take six dollars per week; another, eight years at the bar, would consent to be law clerk or stenographer, at eight dollars a week; another, with six years' experience, would take ten dollars a week; while a "bright young attorney" would accept five dollars a week "to begin." These figures are sadly demonstrative of the hard times and the overcrowded state of the legal profession.

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**THE VALUE OF A BLUNDERING TYPEWRITER.** — Irving Browne, in one of his American letters to the *Law Journal* (London), says: —

The calling of a special session of the legislature of New Jersey last spring was rendered necessary by a mistake made by a female typewriter, in substi-

tuting the word "provided" for "prohibited" in the anti-pool-selling act. It is a wonder she did not substitute "proposed." But after all the error proved a blessing in disguise, because the re-assembling of the legislature to correct it afforded an opportunity to correct another that will save the State a large amount. During the closing hours of the regular session it was found that no provision had been made for a special election so that the people might vote on the proposed constitutional amendments. A bill was hastily drafted, the provision for registration being copied bodily out of the law governing regular elections. This law provides for three days of registration, and under it the cost of the constitutional election would have been about 102,000 dollars. Under the amended bill but one day's registration is provided for, reducing the cost to some 56,000 dollars. The young woman's blunder may therefore be said to have saved the State some 46,000 dollars.

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AN INCREASE IN LEGAL PUBLICATIONS IN ENGLAND. — According to the *Law Journal* (London), there was a striking increase in the number of legal publications in England during the year 1896, no fewer than 182 law books being published in that year, as against ninety in the year 1895. The total number of books was 6,573, so that law may claim to occupy a thirty-sixth part of the field of literature. In 1894 as many as 149 law books were published, as against fifty in 1893, but this great increase was due to the finance act and the local government act, both of which produced a large number of explanatory works. It is not so easy to explain the still larger number published last year. One hundred and thirty-two were new works, while fifty were new editions. The busiest month for the law publishers was October, fifty-two books being then issued. The highest number in any other month was nineteen.

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FREE CONSULTATIONS. — At a recent meeting of the Gloversville (N. Y.) Bar Association, after some discussion, it was decided that the practice of giving free consultations and advice, so long indulged in by the lawyer, should be eliminated, and thereafter all consultations and advice given by members of the association should be charged for. This is a move in the right direction. In the smaller cities and towns the practice of making no charge for consultation and advice has been the rule rather than the exception, and one which it has been a difficult matter to do away with. A lawyer's legal knowledge is his stock, his capital, his merchandise. He has spent money and valuable time to acquire it, and there is no more reason why he should give it to another's use and benefit without receiving pay for it than there would be for a clothier to give away his goods or the merchant his stock. If

the advice of a lawyer is worth anything it is worth paying for. The principle of charging for advice should be strictly adhered to. The Gloversville association has taken a step in the right direction, and it should be universally adopted. — *American Lawyer*.

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**ALIMONY AWARDED TO INDIGENT HUSBAND.**—The decision of Judge Gibbons, of the Superior Court of Cook County, Illinois, awarding alimony to an indigent husband in a suit for divorce, referred to in a former issue, is, so far as our knowledge goes, the first decision of the kind that has been rendered. That such is the case does not in any way impeach the wisdom and justice of the decision. Ordinarily, circumstances will not arise which would call for such an award; and the lack of precedents is no doubt due to the rarity of the occasions under which such a claim would be seriously entertained by a court. But where the husband is without means, and without the ability to earn a living, aged or infirm, while the wife has an abundant estate, there seems to be no reason why she should not be mulcted in alimony for his benefit as the result of a divorce proceeding which she has defended unsuccessfully. Judge Gibbons' decision has already become a precedent; for we note that a similar decree has been rendered by the Superior Court of Los Angeles County, California, Hon. W. T. Allen, judge, in the case of *Livingston v. Livingston*. We hope these decisions will fall under the eyes of frisky old ladies who are thinking of turning their old husbands out to grass and making second marriages with younger and handsomer men. They may be able to do it, just as the ruder sex sometimes does it; but they may have to pay dearly for their fun in the way of alimony to the "old man."

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**CONSTITUTIONAL LAW: VALIDITY OF STATUTES PROVIDING FOR INDETERMINATE SENTENCES.**—A statute of this nature, recently enacted by the legislature of Indiana, has been held unconstitutional by a circuit judge. Under such a law the jury merely find the fact of guilty or not guilty, and the person is sentenced according to his age, either to the reformatory or the penitentiary, and the length of time of his imprisonment is to be determined by his conduct while in prison. Several of the States are experimenting with this kind of a law, and the results, if the law is allowed to stand by the Supreme Courts, will be watched with interest. We presume that the motive which has inspired the enactment of these laws is the belief that the warden of the penitentiary

or some government board will apportion the penalties of the law among the convicts more intelligently than the jury can, and will release them when they have been "sufficiently punished" — to enable them to recommence their depredations on society. In short, it seems to be an outgrowth of that maudlin sentiment with regard to criminals which considers that the object of criminal laws is to reform the criminal, when their real object is to protect society from the attacks of a species of wild beast, and whatever reformation may be accomplished by them or in connection with them is purely incidental to that main object. Whatever the result to society of these indeterminate sentence laws, it can hardly be doubted that they will exercise a salutary influence on the private fortunes of the persons who will have the right to release a convict whenever they conclude that he has suffered enough. They will constitute a jury which is always in session but with the back door of the jury room open.

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**RIGHT OF APPEAL FROM JUSTICES' JUDGMENTS IN THE DISTRICT OF COLUMBIA.**—In the District of Columbia the jurisdiction of a justice of the peace has been recently enlarged<sup>1</sup> to embrace causes involving not more than \$300 of value. When the sum claimed exceeds \$20, either party is entitled to a trial by jury, and in all causes involving more than \$5 of value an appeal may be taken to the Supreme Court of the District. Inasmuch as the constitution of the United States provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law," the Court of Appeals of the District of Columbia has lately decided<sup>2</sup> that the right of appeal extends only to cases tried by the justice of the peace *without* a jury, there being no provision of law for the removal of causes to an appellate court from his court upon bills of exception — the only method by which, at common law, a re-examination could be made. The court held that the jury contemplated by the act of Congress for the trial of causes in the courts of justices of the peace in the District of Columbia is a common law jury, and that on a trial before such a jury the justice of the peace has power to control the introduction of evidence, to instruct the jury on questions of law arising in the case, and, when proper, to set aside the verdict and award a new trial. To the objec-

<sup>1</sup> Act of Congress of February 19, 1895.

<sup>2</sup> The United States ex rel. The

Brightwood Railway Co. v. O'Neal, and Hof v. The Capital Traction Co., 25 Washington Law Reporter, 98.

tion that justices of the peace being often laymen and unacquainted with the law, are incompetent to instruct the jury upon questions of law, the court, speaking through Mr. Justice Morris, says:—

This is a consideration which might properly have weight with the appointing power. \* \* \* It can have no weight whatever in the construction of such a statute as that now under consideration. Moreover, we know of no statute which requires the appointment of ignorant and incompetent persons as justices of the peace; and the common law certainly does not regard ignorance as a qualification for the office.

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CODIFICATION IN NEW JERSEY.—The legislature of this State, under the influence of that distinguished and excellent lawyer, Governor John W. Griggs, has entered upon an extensive scheme of codification. According to the *Albany Law Journal*, the last legislature of that State passed an act which authorized the Governor to appoint six commissions of three each, for that purpose, and Governor Griggs has made the designations as follows:—

To codify district court, mechanics and lien laws: William I. Lewis, Edward A. Atwater and James S. Erwin, Jersey City.

To codify statutes relating to crimes and criminal procedure: J. Frank Fort, Newark; Frederick C. Marsh, James S. Erwin, Jersey City.

To codify acts relating to relief of creditors and absconding debtors and all amendments thereto: William H. Corbin, Elizabeth; James E. Howell, Newark, and Frank Bergin, Elizabeth.

To codify statutes concerning conveyances, partition of lands and sale of lands under public statutes or by virtue of any judicial proceedings and statutes regulating assignments for the benefit of creditors: Frederic Adams Newark; William Pennington and Eugene Stevenson, Paterson.

To codify statutes relating to townships: Alfred Skinner, Newark; William M. Lanning, Trenton; James J. Bergin, Somerville.

To codify statutes relating to infants, orphan's courts, powers and duties of the ordinary and surrogates and statutes concerning executors and administrators: George T. Parrot, Francis J. Swayze, Paterson, and Flavel McGee, Jersey City.

Each is an individual commission, the respective members of which have, presumably, been chosen with reference to their special fitness for the work to be performed. According to the provisions of the law, each commission shall codify such part of the statutes as the Governor shall direct. The several commissions may employ such clerical assistance as they consider necessary, at a moderate compensation, but are to receive no remuneration themselves. On the opening day of the next session their report will be filed and submitted to the legislature for approval. The feature which provides for the gratuitous service of commissioners seems to be doubtful propriety, inasmuch as work which is worth doing at all is worth paying for, and it is hardly

the fair thing to expect such lawyers as are competent to perform the difficult work of codification to sacrifice so much of their time and income as is necessary for that purpose. However, the results will demonstrate the wisdom or unwisdom of the plan.

**THE AMERICAN BAR ASSOCIATION.**— This distinguished and influential body held its twentieth annual meeting at Cleveland, Ohio, on the 25th, 26th and 27th days of August last. By an unfortunate oversight the days of the meeting were exactly coincident with those of the holding of the annual encampment of the Grand Army of the Republic at the neighboring city of Buffalo. This drew off some of the attendance from the American Bar Association; but nevertheless some of the members contrived to divide their time between both meetings. This meeting of the association, though not as successful as the meeting last year, which was distinguished by the attendance of the Lord Chief Justice of England and of other distinguished lawyers of that country,— was nevertheless fairly successful.

The address of the president, Hon. James M. Woolworth, of Nebraska, was a valuable paper, full of thoughtful suggestions, and was well received. The space at our disposal is not sufficient to enable us to print it in this number.

The most noteworthy feature of the meeting was the address of Hon. John W. Griggs, Governor of New Jersey, upon "Law-making." The general purpose of this address was to enforce the idea that, whereas, every other business, public and private, is generally committed to the hands of competent experts, yet the laws of our country and of our several States are made by the incompetent, the inexperienced and the ignorant, and even by the dishonest and corrupt. One of the means proposed by the distinguished speaker for correcting the evil was to place a limitation upon the power of legislative bodies similar to that which obtains in the British Houses of Parliament. No brief description could do justice to this admirable address. It abounded in statistical information, in well-chosen points, and in apt illustrations. It was couched in the most classical English, and its trains of thought and expression were in every case the most happy. We will hazard the statement that, not excepting the address delivered last year by the Lord Chief Justice of England, the equal of this address has never been delivered before the American Bar Association. Since the above was written, we have procured a copy of it, which we print in full elsewhere.

The paper read by Robert Mather, of Illinois, on "Constitutional Construction and the Commerce Clause" was in all respects an admir-

able paper. It was read at the evening session. The paper which immediately followed it—that of Professor Eugene Wambaugh, of Massachusetts, on “The Present Scope of Government,”—was an admirable paper, intended to show the extent to which the government deals with many of the common affairs of life. But as the audience was beginning to get tired, it was not so well received.

One of the noteworthy features of the American Bar Association is the section upon Legal Education. Some useful and interesting papers were read before this section, notably that of Professor Gregory, of Wisconsin, on the “Compensation of Professors in the Law Schools Throughout this Country and Europe.” The paper of Prof. Finch, of Indianapolis, on the “Teaching of Insurance in the Law Schools” was criticised as not being a paper upon legal education or any approach to it, but as being a criticism on legislation unfriendly to insurance companies, by a lawyer who has been long identified with those companies and who has long published a journal in their interest. The paper read by Henry E. Davis, of the District of Columbia, was scholarly and fine.

On the afternoon of the last day of the session some debate took place in the section upon Legal Education with reference to some of the papers which had been read. One member put forth the view that the State is under no obligation to furnish gratuitous instruction in the law, any more than to furnish gratuitous instruction in any other technical science. It is believed that this view is unsound. The sound view is believed to be that the State is under an obligation not only to publish to its citizens the laws by which they are to be governed, but also to instruct them in those laws, and to this end to furnish gratuitous instruction therein to all who may apply therefor. But with the furnishing of such gratuitous instruction, and of a suitable place in which it may be delivered, the duty of the State obviously ends: it stands under no duty to feed, clothe and shelter, or even to furnish books to those whom it thus instructs while they are receiving its instruction.

Another matter which received some discussion was whether the State ought to allow the degree of Bachelor of Laws conferred by incorporated law colleges to entitle the holder to admission to the bar. The better opinion was that it ought not. The better opinion was that, in view of the abuses which have sprung up in this practice, it is better to have all applicants for admission to the bar of a State pass an examination in a prescribed number of subjects or titles in the law, either before the highest court of the State or before a commission of competent members of the bar appointed by that court. Obviously, the standard ought to be uniform. Obviously, the body which passes

upon the qualifications of the applicant ought to be influenced by no other motive than to subserve the administration of justice and the welfare of the people. But the professors of the law schools are influenced by the motive of graduating as many law students as possible, in order to swell the aggregate amount of fees for instruction in the school and to make the best apparent showing of its prosperity. Another abuse in connection with this system is that, if the statute law of the State allows the diploma of the law school of the university of the State to be a title of admission to the bar, every little law school that springs up in the State, like a mushroom in the night, demands from the legislature that its diploma shall carry the same privilege, and generally gets it.

Before quitting the subject of the American Bar Association we desire to renew the suggestion to the executive committee of the advisability of holding a mid-winter session each year in some of the Southern States. This body has always held one-half of its sessions at Saratoga Springs, New York, where it was first organized. For a considerable period after its organization it held all of its sessions there. It has never held a session west of the western shore of Lake Michigan. None of its sessions has ever been held as far west as the center of population of the United States which is now in the vicinity of St. Louis. A scrutiny of the roll of members attending each session will show that the attendance is very largely made up of lawyers living at no very great distance from the place of meeting. The plain truth is that this learned body is and always has been too much of a Northeastern Bar Association. The only conspicuous honor which it has to confer, that of its presidency, has, it is true, always been passed around to the different sections of the country. Massachusetts had it last year, Nebraska this year, and Louisiana will have it next year. But the fact remains that the great preponderance of its active membership is in the East and Northeast. This does not, of course, detract from its dignity or efficiency; but it prevents it from being in the largest sense the representative of the best opinion of the bar of the whole country.

Point is given to this suggestion by the manner in which the session treated the learned report which we elsewhere publish in this number, of the committee on Jurisprudence and Law Reform, dealing with the judicial construction of the so-called Federal Anti-Trust Law. It will appear from that report that, in every instance save one, whenever an attempt was made in a Federal court to enforce that law against the rich and powerful, the court found lions and even mountains in the way; that in that one case the decision in favor of popular right was



rendered by a court almost equally divided; and that, taking all the judges in the court above and in the court below who had voted upon the question, there was a preponderance of one vote against the law. And when we consider that the minority of the ultimate court put forward the astonishing proposition that a restraint of trade is to be innocent or punishable as a crime accordingly as some judge subsequently—applying possibly the measurement of the chancellor's foot—deems the act to be reasonable or unreasonable,—we have a standing illustration of the difficulty of enforcing the plainest possible statute against the aggregated rich. Whereas, when it came to enforce it against striking dock laborers and railway laborers, whose labor insurrections interfered with the operations of interstate commerce, the Federal judicial mind glided easily, nay swiftly, to a favorable result. Here was a field for debate such as has rarely been presented to such a body. Nevertheless the corporation lawyers, who composed the power and the talent of the meeting, passed the report by “*sub silentio* and with everted eye,” and consumed the evening during which they might have debated it, in a wrangle over the question of international arbitration,—a question, not of law, but of politics and diplomacy.

We vote to hold the next meeting of the American Bar Association some time during the coming winter in the city of New Orleans. Although the bar of Louisiana is behind that of many other States in that they have no State bar association, yet there are among them many distinguished lawyers; and the bar and people of that State will not be outdone in hospitality.

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**THE AMERICAN BAR ASSOCIATION SECURES REFORMS IN THE PATENT LAWS.**—An illustration of the influence and usefulness of the American Bar Association is found in the report of Edmund Wetmore, of New York, chairman of the committee on Patent Law, from which it will appear that very substantial amendments and improvements in the laws of Congress relating to the procedure for obtaining patents for inventions were enacted by the last Congress upon the initiative of the Association. The report contains the following statements:—

At the meeting of the Association at Detroit, in August, 1895, the committee on amendments of the patent law was continued, with power to advocate before Congress, the amendments proposed by their report, approved by this association. In pursuance of this authority, a bill, embodying the amendments, was introduced into the House of Representatives at the first session of the Fifty-fourth Congress, and was unanimously reported and placed upon the calendar of the House, but as none but appropriation bills, with very few ex-

ceptions, were taken up at that session, the bill was not reached. At the last regular session the bill was introduced both in the House and the Senate. It received most careful attention. The members of your committee appeared before the patent committees of both Houses, and the proposed amendments were subjected to strict scrutiny. A large number of persons interested in the matters to which the bill appertained, filed memorials or were heard by the committees.

Some opposition was developed to some of the amendments. The bill provided that an application for a patent should be deemed abandoned if the applicant omitted for six months to take any steps in prosecuting the same. It appeared that this period was somewhat too short, and it was extended to one year, and some additional provisions and slight changes were made in the Patent committees of the House or Senate.

The bill, as finally reported, was passed in both bodies upon the last day of the session, and received the approval of the President, and is now embodied in chapter 891 of the United States Statutes for the current year.

Your committee again desire to express their appreciation of the courtesy which they received in both branches of Congress in presenting the amendments, under the sanction of this association. Much interest was manifested in the matter, and the effort to secure the desired legislation met with cordial co-operation both in the Senate and the House.

The amendments, which go into effect on the first of January next, cure some admitted defects in the law, establish a uniform statute of limitations, tend to promote greater promptness in prosecuting applications before the Patent Office, without attempting any radical changes in the system that has been so long established and afford, your committee believes, a gratifying instance of the influence of this association in promoting wise reforms in the administration of justice.

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**THE AMERICAN BAR ASSOCIATION ON INTERNATIONAL ARBITRATION.**—The heated debate in the American Bar Association on the first evening of its session upon the subject of International Arbitration resulted in the appointment of a special committee which, on the following day, reported to the association the following resolution:—

“To the American Bar Association:

“The special committee to whom were referred the report of the committee on international law, and especially the resolutions appended to that report, and the several amendments proposed thereto, with instructions to submit to the association a resolution embodying their views as to the action proper to be taken by the association at this time, have considered the subject with as much care as the limited time at their disposal has allowed, and respectfully present as a substitute for the resolutions of the committee, and for all the amendments thereto, the following resolutions:—

Resolved, That the American Bar Association, reviewing with emphasis the strong declaration made by it at its last annual meeting in favor of the adjustment of controversies between nations by the medium of enlightened interna-

tional arbitration, expresses its earnest hope that the efforts to establish a beneficent principle may not fall in their general spirit and purpose; and that the administration of President McKinley will take such steps as may be appropriate to negotiate just and liberal treaties with foreign powers for the accomplishment of this important result.

"Resolved, further, That a copy of these resolutions, signed by the president and secretary of the association, be sent to the President of the United States.

The members of the committee were: John Prentiss Poe of Maryland, J. H. Hoyt of Ohio, and E. B. Sherman of Chicago. The resolution was adopted.

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REFORMS IN FEDERAL CRIMINAL PROCEDURE.—The committee of the American Bar Association on the "Federal Code of Criminal Procedure" reported that they were of the opinion that it was not expedient to provide by law for the compensation of counsel for accused persons on trial in the United States courts in all cases, but that in case of persons indicted for crimes punishable by death or imprisonment for life, some provision of law should be made for the employment and compensation of counsel for the defense, such as is found in some of the State statutes. The Revised Statutes of the United States provide for the assignment of counsel in capital cases, not exceeding two, as the accused may desire, but no provision is made for the compensation of such counsel.

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A PROPOSITION TO SIMPLIFY THE FEDERAL JUDICIAL ESTABLISHMENT.—The president of the American Bar Association, Mr. Woolworth, read a letter from Senator Hoar, of Massachusetts, chairman of the Senate Committee on the judiciary, asking the association to take into consideration the anomalous division of jurisdiction between the Federal Circuit and District courts, almost always held by the same judge. Mr. Woolworth stated that the idea of simplifying the Federal judicial system had long been a favorite one with Senator Hoar. He and others spoke in favor of the view that the anomaly of two courts, the Circuit courts and the District courts, each held by the same judge, and in many jurisdictions in the same court room and at the same time, both courts being opened at once by the same crier, the clerk of one court attending on the one hand and the clerk of the other court attending on the other hand,—ought to be abolished. Clearly there is no propriety in having two Federal courts of *nisi prius*. There ought to be but one, exercis-

ing every species of jurisdiction, common law, equity, admiralty, criminal, that relating to revenue, the national banks, etc. This would place all the Federal judges of *nisi prius* on a common footing, and would tend to give equal pay to those who do equal work. The Federal courts of appeal could then, as now, be supplied by details of judges from the circuit courts, or what would be better, by judges appointed for the purpose of exercising appellate jurisdiction only. Clearly, no judicial establishment should permit of a judge sitting in an appellate court on an appeal from his own decision. Under such circumstances the judge is necessarily, to a certain extent, himself on trial. His pride of opinion supervenes to prevent that mental receptivity which is necessary to a proper review of his own decisions. In the way of any reform of this kind lies the difficulty which so long prevented the establishment of the Federal courts of appeal,—a growing jealousy of the encroachments of the Federal judiciary, and a growing feeling that, by making that establishment more powerful, the conditions which make those encroachments possible would be increased. We have, during the present year, witnessed the spectacle of Federal judges in West Virginia interfering by injunction with matters which, under all the early conceptions of the relations of State to the general government, belong to the States, as matters of purely local municipal government. When we recall that this jurisdiction is frequently obtained under the false pretense that a corporation aggregate is a "citizen" within the meaning of the constitution of the United States, the spectacle becomes at once shameful and alarming; and the question arises whether we shall not too soon arrive at the condition where all the powers of government, both Federal and State, lie at the feet of an appointive judiciary, responsible to no one. The debate resulted in the appointment, upon motion of Mr. Woolworth, the president of the Association, of a special committee to take the subject into consideration and report upon it at the next meeting.

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THE PATENT LAW SECTION OF THE AMERICAN BAR ASSOCIATION.—Not the least important of the sections of the American Bar Association is that devoted to patent law. This branch of the law is special and peculiar. It requires, of course, a large training in the principles of equity, of chancery pleading and practice, and in the rules of evidence. Beyond that, everything is peculiar and technical; and in order to be a good patent lawyer one must have a mind capable of mastering mechanical details. As the writer of this note did not attend the meetings of

the section on patent law, the following subjoined account of its proceedings are taken from the *Cleveland Leader*:—

Frank F. Reed of Chicago read a paper on "Trade Censorship by Equity" before the members of the patent section. He was followed by J. H. Raymond of Chicago, who advocated the establishment of a patent bar by act of Congress. He proposed the appointment of five commissioners to examine applicants to be admitted to practice before the Patent Office. In the discussion which followed it was suggested that the proposition might be impracticable for the reason that the country was so large the expense incurred in compelling an attorney to proceed to Washington from the far West to be examined would result in making the law practically prohibitory. Francis Forbes, of New York, late delegate from the United States to the conference held under the convention for the Protection of Industrial Property, concluded at Paris, March 20, 1883, read a paper in which he recited the history of the movement for the protection of industrial property which finally culminated in the convention which numbers among its members, in the United States, Great Britain, France, Belgium, Norway, Sweden, Denmark, Spain, Portugal, Italy, Brazil, Holland, Servia, Switzerland, San Domingo, Tunis, and Austro-Hungary. By industrial property is meant patents, trade-marks, and commercial names.

Mr. Forbes brought out clearly the fact that the central thought of the convention was the facility of sales of "industrial ideas" embodied in machines and processes of manufacture and the promotion of fair dealing in the matter of the indicia of trade.

Because of the difference of policy of the different nations, members of the union, in regard to the protection of inventions, it would be impossible without the convention to make a sale of an invention everywhere without first patenting. In Great Britain, France, Belgium, and most of the other European countries, no publicity is allowed before the patenting of an invention. The result is that an American inventor would, without the convention, be compelled to patent his invention abroad at a great expense before offering it for sale. By the terms of the convention, the description of the invention and its use anywhere during seven months after his application for a patent here does not vitiate any after-acquired patent applied for before the expiration of that period. This allows American inventors a period of time in which to freely offer their inventions for sale abroad at the bare expense of the author.

"The privileges granted by the convention," Mr. Forbes said, "have been but sparsely used in the past, because of our law repealed March 3, 1897, which made the United States patent expire with the foreign patent having the shortest term. The examination to which applications are subjected in the United States generally extends beyond seven months, and our inventors have forfeited their right of application abroad rather than shorten the term of the United States patent. This difficulty having been removed, it may be expected that the privileges of the convention will be largely availed of.

"The convention will also afford protection to exhibitors of inventions at the Paris Exposition in 1900 for which patents have not been applied for here, or for which patents have been applied for within less than seven months, no matter whether a patent has been granted or not. Without such provision the invention would from the moment of its exhibition cease to be patentable in

France. If advantage is taken of the convention our inventors may profit from their exhibits through a sale of their inventions."

Mr. Forbes also stated at length the advantages which flow to American manufacturers and merchants from the treaty provisions in regard to trade-marks and commercial names.

"The convention provides," he said, "the most stringent rules for the suppression of their unlawful use, such as seizure of the goods bearing false marks in countries which allow seizure and the prevention of importation into others where seizure is not allowed. Our citizens are put on an equality as to prosecutions for infringement of trade-marks and commercial names in any of the States of the Union above named with the citizens of those countries. The convention being a treaty, the Federal government has the constitutional power to pass laws to carry it into effect.

"All over the world the word 'American' is being used to palm off goods not made here. I hope to see this abuse stopped as our trade expands, and our powers under the convention become known."

The papers of Messrs. Reed, Raymond and Forbes were referred to the committee of fifteen of the patent section, with instruction to report on them at the next annual meeting.

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**THE NEW BRITISH STATUTE RELATING TO THE COMPENSATION OF WORKMEN FOR ACCIDENTS.**—We have had several inquiries concerning the scope of this statute, and we expect to have it dealt with more at large hereafter by the pen of a learned member of the English bar. For the present we subjoin the following brief description of it which we clip from the *Law Times* (London) for August 14:—

Yet another highly controversial measure may be mentioned in the Workmen (Compensation for Accidents) Act introduced by the Home Secretary. In a previous administration, a system of severe penalties had been proposed in order to bring home responsibility to employers. This proposal collapsed. The present act seeks the same end by different means. An experimental and of intention narrow measure, it applies to a few out of many industries. Employers in the departments of industry represented by railways, factories, mines, quarries, or engineering works, persons dealing with buildings over thirty feet high by way of construction, demolition or repair by scaffolding, or on which steam, water, or other power is used, are liable to compensate workmen for personal injuries arising out of and in the course of their work. The scale of compensation is indicated by a schedule. Where the injury is due to the act of a stranger under circumstances creating a legal liability to pay damages in respect thereof, the workman can proceed either against the stranger or the employer. In the latter event, the employer can enforce, in the workman's name, all rights of action possessed by him against the person causing the injury. Sec. 2 provides that no liability accrues in respect of injuries disabling the employé for less than two weeks from earning full wages at his work. The ordinary civil liability of an employer for damage caused by his own negligence and default, or that of some person for whom he is responsible, is

untouched, The amount of damages can be determined either by arbitration in accordance with another schedule or by the old procedure. An employer, however, cannot be attached both under the act and independently of it. It is necessary for a workman to give notice at once of an accident and to claim compensation within six months, or, in case of death, for his representatives to claim within one year; but an omission to comply with this is not fatal unless the employer is thereby prejudiced in his defense. In the House of Lords an amendment was carried by which if the accident is found to be attributable (not "solely" attributable) to the serious and willful misconduct of the sufferer, he can claim no compensation.

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AN INTERNATIONAL BAR ASSOCIATION. — The *Law Journal* (London) gives, in its editorial pages, the following account of what may be termed the First International Bar Association. It is to be regretted that the United States was not represented. The American Bar Association would, on request, certainly, have named delegates to so distinguished a body:—

It is singular that it should have been reserved for the Bar of the little kingdom of Belgium to initiate and carry through an International Congress of Advocates. The first Congress begins to-morrow, the 1st of August. There will be delegates from Great Britain, Germany, Austro-Hungary, Spain, France, the Grand Duchy of Luxembourg, Holland, Italy, Russia, Sweden, and Switzerland. The English delegates are Mr. Crackanthorpe, Q. C., and Mr. McIlwraith, nominated by the Bar Council; Mr. Iselin, secretary of the Hardwicke Society; Mr. John Budd, representing the Incorporated Law Society; and Mr. Thomas Barclay, a member of the Society of Comparative Legislation.

M. Picard, in speaking of this Congress in the Belgian Senate on the 16th of July, protested against what he conceived to be the ridicule with which the Congress had been greeted by the Minister of Justice. The latter disclaimed any such intention. M. Picard was very eloquent both in his defense of the action of the Bar and in condemnation of the members of the Senate who sneered at the action of the Federation. He said: "The Federation of Belgian Advocates, which has taken the initiative in promoting the Congress, as it has previously taken the initiative in so many important matters in the domain of law, does not come here as a mendicant. It has refused a subsidy—it will carry its work through unaided. It is big enough and strong enough for that. Perhaps the reception which the Federation wishes to give to the strangers who will assist at the Congress without being less fruitful or less laborious, will be less imposing and less brilliant. I confess that my own view is that that won't matter. I like a Congress much better which has all its own work to do."

The public interest, not any narrow professional movement, M. Picard eloquently asserted, is what the Congress will have in view. The Car of Justice, he said, ought to be drawn by the Bench and the Bar. And the function of the Bar is nobly put in this striking passage, which we will not translate:—

"Mais qu'est que c'est qu'un bon Barreau? Alors que toutes les institu-

tions sociales sont aujourd'hui mises en question — les unes dans leur fondement même, les autres au point de vue des modifications et des améliorations à y introduire — quand telle est aujourd'hui l'universelle préoccupation des peuples de race americano-européennes voulant plus d'équité et de véritable humanité dans leur organisation, on ne doit pas s'étonner que pour le Barreau également, on se demande si, tel est qu'il est établi soit dans notre pays, soit chez les autres nations auxquelles nous unit ce fraternel lien de l'identité de race, il représente, au point de vue de l'aide, qu'il doit à la justice, ce qu'il y a de mieux.

" Cette pensée, Messieurs, est dans l'âme de tous les hommes de droit dignes de ce titre. Le Barreau est attaqué parfois avec véhémence. Il est aussi défendu avec passion. Il y a là comme ailleurs, les progressistes et les conservateurs — ceux qui veulent le maintien du passé, ceux qui songent au perfectionnement de l'avenir."

That, he added, was the idea in bringing together this Congress of European advocates. Bravo, M. Picard, bravo!

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USE OF THE CATHODE RAY AS EVIDENCE.— The *American Lawyer* for August has the following:—

The cathode ray is destined to take an important part in our courts in determining the extent and manner of injury sustained by the plaintiff in a suit for damages. The case of *Bruce v. Beall*,<sup>1</sup> reported in 41 S. W.,<sup>2</sup> was an action brought for injuries sustained by the fall of an elevator. Dr. Gallman was introduced as a witness, and was permitted to submit to the jury an X-ray photograph taken by him, showing the overlapping bones of one of the plaintiff's legs at a point where it was broken by the fall. The defendant, by his attorney, objected to the admissibility of this evidence. It is difficult to understand upon what ground this objection was made. The photograph was taken by a physician and surgeon who was not only familiar with fractures, but with the new process by which this particular impression was secured. His testimony was, in effect, that the photograph accurately represented the condition of the leg at the point of the fracture, and, as a fact, by the aid of the X-rays he was enabled to see the broken overlapping bones exactly as if, stripped of the skin and tissues, they were uncovered to his sight. Experiments made by scientific men have demonstrated the power of the X-rays to reveal to the natural eye the entire structure of the human body, and that its various interior parts can be photographed as well as its exterior surface has been and now is. Diagrams of the *locus in quo*, drawn by hand, have frequently been used to aid a judge or a jury to an intelligent conception of matters to be determined, and the competency of the testimony of one who stated that he knew the diagram to be accurate, and who then used it to illustrate his statement, has seldom, if ever, been questioned. By the aid of the X-rays the jury was afforded a much more intelligent idea of the injury than they could have obtained by a verbal description by a surgeon. The question involved is similar

<sup>1</sup> Tennessee.

<sup>2</sup> 445.



to that of *Smith v. Grant*, tried in the First District of Colorado. In numerous cases photographs have been held competent which showed exterior surfaces. They have been held competent on the question of the identity of persons,<sup>1</sup> and to identify premises,<sup>2</sup> also in cases of handwriting.<sup>3</sup> The competency of the photograph as evidence ought largely to depend upon the science, skill, experience and intelligence of the person taking the picture and testifying with respect thereto. In the absence of these qualifications the photograph should not be admitted.

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**CORPORATIONS: POWER OF DIRECTORS TO PREFER THEMSELVES AS CREDITORS.** — While public impatience over the rascally manipulations of corporate directors and managers is increasing, a disposition on the part of the judges to give them the longest possible tether, and to condone their offenses against honesty and business morals, seems to be steadily increasing. In the recent case of *Buller v. Harrison &c. Co.*,<sup>4</sup> the Supreme Court of Missouri announced the doctrine that it is not contrary to the public policy of Missouri for the directors of a business corporation to prefer themselves as creditors over outsiders, although the latter may have been induced to give credit to the concern for the directors' benefit. The court added the usual proviso that in doing this they act in good faith. But in the eye of conscience and common honesty a director can no more use the corporate assets in good faith to prefer himself as a creditor over outsiders whom he has induced to give credit to the corporation of which he is a member, than a partner can make such use of the assets of the partnership firm. The thing is essentially dishonest and corrupt, and such a thing cannot be done with good faith.

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**CONSTITUTIONAL LAW: VALIDITY OF THE INDIANA STATUTE REDUCING STREET CAR FARES.** — The fact that whenever the legislature of a State passes a statute which the corporations find it to their interest to set aside, they find ready listeners and subservient allies in the Federal judges, was lately demonstrated by a decision of Mr. Circuit Judge Showalter, sitting in the United States court in Indiana, declaring invalid the recent statute of that State, reducing the maximum fares which may be charged by street car companies in corporations of that State having a population of 100,000, from five cents to three cents

<sup>1</sup> *Udderzook v. Com.*, 79 Pa. St. 340;  
*Cowley v. People*, 83 N. Y. 464; *Luke*  
*v. Calhoun Co.*, 53 Ala. 118.

<sup>2</sup> *Church v. City of Milwaukee*, 31

Wis. 512; *Blair v. Pelham*, 118 Mass.  
 421.

<sup>3</sup> *Marcy v. Barnes*, 16 Gray, 161.

<sup>4</sup> 41 S. W. Rep. 235.

per passenger; and the decision of the Supreme Court of Indiana holding that the same statute is valid. It is needless to add that, according to the prevailing fashion, the Federal court of *nisi prius* overruled the State court of highest appellate jurisdiction, and the corporations go on defying the law and collecting five cent fares.

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**THE NEW YORK ANTI-TRUST LAW DECLARED UNCONSTITUTIONAL.** — Judge Chester, of the Supreme Court of New York, sitting at special term, has held that the late anti-trust laws of New York<sup>1</sup> which provide an inquisitorial method for finding out whether a corporation has become a member of a so-called trust, is unconstitutional, as invading the constitutional immunity of a person from testifying against himself. There is altogether too much constitutional law of this kind for the rascals whom such decisions are designed to protect.

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**MEN WHO HAVE DECLINED THE OFFICE OF CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.** — Our learned contemporary, *The National Corporation Reporter*, published at Chicago, in an appreciative notice of our last number, points out an error in our article on the Venezuela Boundary Arbitration, in the following language: —

The writers of the article on the Venezuela Boundary Arbitration, speaking of the Chief Justices of the United States, and of the fact that President Grant had tendered the Chief Justiceship to Roscoe Conklyn, err in saying that Conklyn is on record as being the only man to decline the Chief Justiceship. They inadvertently forgot the fact that after Ellsworth resigned the office in November, 1800, President Adams nominated Jay (for the second time) without prior notice to him, and his commission was dated December 19, 1800. "I had no permission from you," wrote Adams, "to take this step, but it appeared to me that providence had thrown in my way an opportunity, not only of marking to the public the spot, where, in my opinion, the greatest mass of worth remained collected in one individual, but of furnishing my country with the best security afforded its inhabitants, against its increasing dissolution of morals." To this Jay, on January 2, 1801, replied: "I left the Bench perfectly convinced that, under a system so defective, it would not obtain the energy, weight and dignity which was essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence, I am induced to doubt, both the propriety and expediency of my returning to the Bench, under the present system." This declination gave us Chief Justice Marshall, commissioned Janu-

<sup>1</sup> Laws of New York, 1897, chs. 383, 384.

ary 31, 1801. It will also be remembered that, when the nomination of Rutledge was rejected by the Senate, Washington, through General Henry Lee, offered to Patrick Henry the Chief Justiceship of the "Superior Court of the United States," which Henry declined. William Cushing, then Associate Justice, was commissioned as Chief Justice, on January 27, 1796, but declined, as he preferred to retain his position. The nomination of Ellsworth now followed, and he was commissioned March 4, 1796.

In this connection, it may be well to remark that the designation of the Justices of the United States Supreme Court for other purposes than judicial, has not added to the lasting fame of that tribunal.

In the early days of the Republic, it came near destroying the usefulness of the court. Charles Pinkney, South Carolina's Senator, in March, 1800, in a Senate debate, severely commented upon the fact that the judges were being sent away as foreign envoys; and he asserted that it was contrary to the dignity of the President, and the honor and independence of the judges to hold out to them the temptation of being envoys, or of giving them other offices; that no man ought to hold two offices under the same government. A judge might be induced to accept any other appointment from the Executive, or even from foreign powers. He contended for a provision, similar to that of South Carolina's constitution, that no judge should hold any other office of private or public trust, under the State, United States, or any other power.<sup>1</sup> The designation of Justice Bradley to the Electoral Commission was most unfortunate. Justice Harlan, as Commissioner to the Behring Sea Arbitration, made international fame for himself. The appointments of the Chief Justice and Justice Brewer to the Venezuela Arbitration will no doubt bring credit to the American people; but the practice is not commendable, and Charles Pinkney's words, pronounced nearly 100 years ago, are still potent for their wisdom.

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**ABOUT THE LAW SCHOOLS.** — The calendar of the Law School of DALHOUSIE UNIVERSITY (Halifax, N. S.) which school we have on several occasions commended, shows that the course of study extends over three years, with a total of sixty-seven students. We do not notice any American students in the list for this year. In former years there were several.

The vacation number of the *Athenæum Law Bulletin*, published, as we infer, by the students of the CHICAGO COLLEGE OF LAW, is very attractive. It is printed on calender paper and gives the portraits of the faculty of the law college whose organ it is, as well as those of some of the graduating students. Some of these latter are ladies. It also gives the portrait of John Esher Knobel, LL.B., winner of the prize of fifty dollars established by T. H. Flood & Company, the law publishers. This prize was awarded this year for the best essay or

<sup>1</sup> See Benton's Debates, Vol. 2, pp. 419, 421.

thesis on "The Interposition of Civil Courts in Ecclesiastical Matters." Mr. Knobel's able thesis is also published in full in the same number. The graduating exercises wound up with a banquet of the Alumni Association, the same being its eighth annual banquet. This very successful law school was formerly conducted as a private school, but is now conducted as the law department of Lake Forest University. Hon. Thomas A. Moran, LL.D., formerly a judge of the Appellate Court of Illinois, is and always has been (we believe) its dean. Among its faculty are many distinguished lawyers, notably Hon. Simeon P. Shope, formerly a judge of the Supreme Court of Illinois, and Hon. John Gibbons, LL.D., editor of the *Chicago Law Journal*, and at present one of the judges of the Superior Court of Cook County, Illinois. We recognize among the portraits that of our old friend Adelbert Hamilton, LL.B., long a lecturer in that celebrated law school, and formerly a contributor to this REVIEW.

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The WESTERN RESERVE UNIVERSITY, of Cleveland, Ohio, has lately added to its collection of buildings a building for its college of law. It is modest in size, but beautifully designed and constructed, and complete in all of its appointments. It is built of Cleveland sandstone, quarried in the vicinity, and is said to have been completed at a cost of not more than \$25,000. In some other cities it might have cost twice as much. The trustees of this flourishing university have had the good sense to adopt the policy of placing at its head a young man, Dr. Thwing, somewhere in the forties, who possesses a clear eye, a clear head, a rich store of learning, gracious and affable manners, and a sympathy for young men well calculated to win his way among them.

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THE FEDERAL COURT INJUNCTION AGAINST THE STRIKING COAL MINERS IN WEST VIRGINIA.—The action of Mr. Federal District Judge Jackson, of the District of West Virginia, in the month of August last, in issuing an injunction against the striking coal miners who were marching in bodies upon the premises of certain mine-owners with the view of inducing their miners to join the strike, called forth severe denunciation on the part of some of the misinformed newspapers. A careful examination into the case will make it appear that these newspapers first misrepresented the nature of the order, and then denounced it. They represented it as a general order restraining the striking miners

from holding meetings to discuss their grievances,—in other words, infringing their liberty of speech. This was grossly false. What the learned judge did was to grant injunctive orders in several cases restraining Eugene V. Debs, M. D. Ratchford, and others, from *entering the private property* of certain mine-owners for the purpose of interfering with their employés, either by intimidation or the holding of public or private assemblages upon the said property; and then there was a supplementary order warning the strikers that marching to and fro through the company's property at any time would be regarded as an effort to intimidate their employés and a violation of the injunction. One great grievance was that this marching to and fro through the property of the particular mining company took place on the public highway; but how that could make any difference does not appear. Clearly the striking miners had the right to use the public highway for ordinary purposes of travel; but they had no right to use it for the purpose of marching to and fro in great numbers, intending thereby to intimidate the employés working mines immediately adjacent, who were obliged to use the highway in going to and returning from their work. We do not know how the court obtained jurisdiction to make any orders in the premises at all. We assume that it was on the ground of diverse State citizenship. It is to be observed that, in respect to the ground of jurisdiction, this case differs from the contempt proceedings against Debs growing out of the railway riots of 1894; for the conspiracy set on foot by Debs involved an interruption of interstate commerce, and was directly within the prohibition of the Federal Anti-Trust law. We have before us printed copies of the orders made in three cases and we find that the plaintiff in each case was an individual, and not a corporation. For fear that the accuracy of the above statement concerning the force of these injunctive orders may be doubted, we subjoin the restraining portions of them, omitting the captions. Two of them were issued in suits against Eugene V. Debs and others, and one of them in a suit against M. D. Ratchford and others. The language of the first and principal restraining order was as follows:—

Upon consideration whereof the bill is ordered to be filed, and process issued thereon, and a temporary restraining order is allowed, restraining and inhibiting the defendants, and all others associated or connected with them, from in anywise interfering with the management, operation or conducting of said mines by their owners or those operating them, either by menaces, threats, or any character of intimidation used to prevent the employés of said mines from going to or from said mines, or from engaging in the business of mining in said mines.

And the defendants are further restrained from entering upon the property of the owners of the said West Fairmont Coal and Coke Company for the pur-

pose of interfering with the employes of said company, either by intimidation or the holding of either public or private assemblages upon said property, or in anywise molesting, interfering with or intimidating the employes of the said West Fairmont Coal and Coke Company so as to induce them to abandon their work in said mines.

And the defendants are further restrained from assembling in the paths, approaches and roads upon said property leading to and from their homes and residences to the mines, along which the employes of the West Fairmont Coal and Coke Company are compelled to travel to get to them, or in any way interfering with the employes of said company in passing to and from their work, either by threats, menaces or intimidation; and the defendants are further restrained from entering the said mines and interfering with the employes in their mining operations within said mines, or assembling upon said property at or near the entrance of said mines.

The purpose and object of this restraining order is to prevent all unlawful combinations and conspiracies, and to restrain all the defendants engaged in the promotion of such unlawful combinations and conspiracies from entering upon the property of the West Fairmont Coal and Coke Company described in this order, and from in any wise interfering with the employes of said company in their mining operations, either within the mines or in passing from their homes to the mines and upon their return to their homes, and from unlawfully inciting persons who are engaged in working the mines from ceasing to work in the mines, or in anywise advising such acts as may result in violations, and destruction of the rights of the plaintiff in this property.

The language of the supplementary order, which was not issued by Mr. Circuit Judge Goff, as the newspapers stated, but which was issued by Mr. District Judge Jackson after consulting with Judge Goff, was as follows:—

On motion of A. B. Fleming, counsel for plaintiffs in foregoing cases, it is ordered that the marshal of this district do notify and warn the strikers that marching to and fro through the company's property at any time in the above cases will be regarded as an effort to intimidate the miners of said companies, and such marching will be considered as a violation of the injunction heretofore awarded in the above cases.

The right to an injunction in such cases has been reaffirmed so often that it must be regarded as a settled question. In such cases, as in others, an injunction is granted for the purpose of protecting property and business, and not for the purpose of enforcing the criminal laws; but the circumstance that the act which is restrained may involve an infraction of those laws does not any the less entitle the person or corporation whose property or business is threatened by it, to an injunction. It is true that the criminal laws of the State ought, in such a case, if properly enforced, to be sufficient for the protection of the rights sought to be protected by injunction. But these laws are, in many cases, entirely insufficient, and in other cases no disposition is

exhibited on the part of the local authorities to enforce them. Those who inveigh against "government by injunction" do not stop to consider that such government is better than no government at all. Nor does it lay in the mouths of persons intending to commit crime to object that they are restrained from so doing by a court of equity.

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FEDERAL WRITS OF HABEAS CORPUS TO REVIEW STATE SENTENCES.—We renew attention to the gross abuse of the Federal writ of *habeas corpus* in the case of Durrant, referred to by us in a former number of this publication.<sup>1</sup> It will appear that, after all resources had been exhausted in the State tribunals; that after a judgment convicting Durrant of murder had been affirmed by the Supreme Court of California; that after the Governor of California had refused executive clemency;—an application was made to Mr. Federal Circuit Judge Gilbert for a writ of *habeas corpus*, thus endeavoring to appeal from the Supreme Court of California to a Federal circuit judge of *nisi prius* by means of this writ. The learned judge very properly denied the application. He properly denied it for the reason (if for no other) that the proper rules of procedure required Durrant, if convicted in violation of the constitution of the United States, to prosecute a writ of error in the Supreme Court of the United States in the regular course of justice, and not to try to appeal from the Supreme Court of California to a Federal judge of *nisi prius*. Then followed an abuse, which under the rulings of some of the United States circuit judges, Judge Gilbert was unable to prevent,—the granting of an appeal from his order to the Supreme Court of the United States, under an act of Congress allowing appeals in *habeas corpus* cases. The AMERICAN LAW REVIEW may claim, in some sense, the paternity of that statute. After repeated representations in this publication of the abuses which were continually taking place in the use of the writ of *habeas corpus* by Federal judges to enlarge prisoners held under State process, one of the editors of this publication read a paper on this subject before the American Bar Association at Saratoga, in the year 1883. It happened that there were present at that meeting two distinguished lawyers who were then members of the Judiciary Committee of the House of Representatives,—Luke P. Poland, of Vermont, and James O. Broadhead, of Missouri. Some action on the subject was taken by the Association, we do not exactly remember what. But these gentlemen took the matter up in

<sup>1</sup> 81 Am. L. Rev. 600.

Congress and their efforts resulted in the passage of the existing statute. Some of the courts of the United States have construed the statute as allowing an appeal from the refusal of a Federal judge to grant the writ of *habeas corpus* even in cases of prisoners held under State judgments,—thus making the statute allowing an appeal a means of abuse much greater than originally existed. Under this construction of the statute, after a capital conviction in a State court and its affirmation by the highest State appellate court, an appeal may be taken in every case as a matter of right, through the mere form of applying to a Federal judge of *nisi prius* for a writ of *habeas corpus*, and appealing to the Supreme Court of the United States from his order denying the writ. Durrant murdered at nearly the same time two young girls in a church of which he was a member, as far back as the year 1893. The attending circumstances were hideous and revolting, and stamp him as a moral pervert of the lowest possible type. He is still breathing the vital air. If the crime had taken place in England or Canada, he would have been hung within three or four months from its discovery. It is idle to tell us that such delays of justice do not furnish the primary cause of lynchings of criminals which are taking place all over the country. If the murders had taken place in a country place anywhere in California, or almost anywhere else in the western or southern portions of our country, Durrant would have been quickly lynched. But it took place in a large city where such irregular violence is kept down by a powerful police force. He has therefore been allowed to escape the dues of justice for four long years, and the delay in his punishment has tended to soften popular opinion toward him and to make his execution, when it shall take place, that of a martyr.

A more exact and detailed statement of this abuse of the right to appeal in *habeas corpus* cases would make it appear that it was practiced in the case of Worden, the railroad striker who sawed the bridge over a slough near Sacramento, precipitating a train into the water and killing a number of soldiers, as well as in the case of Durrant. Applications or petitions were filed by the attorneys for Durrant and Worden for writs of *habeas corpus*. The petition for Durrant was filed in the United States Circuit Court; that of Worden in the United States District Court, although the latter, when his application for a writ was denied in the District Court, also applied to the United States Circuit Court. The petitions alleged, generally, that the prisoner's constitutional rights had been violated. In Durrant's petition, it was claimed, among other things, that his constitutional rights had been infringed, in that he had not been indicted but had been put to trial upon an information; that the jury was not an impartial one, etc. Judges Morrow



and Gilbert, in the Circuit Court, and Judge Hawley, in the District Court, refused to grant the writ of *habeas corpus* prayed for, and *dismissed the petitions*. From these orders, both petitioners have appealed to the Supreme Court of the United States.<sup>1</sup> Until these appeals are passed upon, both invoked the provisions of section 766 of the Revised Statutes of the United States, as a stay of proceedings in the State courts, and to protect them from execution. Governor Budd had declined to grant any more reprieves, being satisfied that the proceedings were simply for delay, and that the alleged questions of deprivation of their constitutional rights are nothing more than mere vaporings to secure delay. Warden Hall of the California penitentiary at San Quentin, in whose hands the life of the prisoners now hangs, acting upon the advice of the Attorney-General of the State, has determined to wait until the appeals in the United States Supreme Court are decided.

No appeal should be granted from the refusal to grant the writ in the first instance. The correct solution of the entire difficulty is to provide that another application may be had before a higher court, where the application may be disposed of summarily and without unnecessary delay. Otherwise it can well be seen what flagrant abuses section 766 would give rise to. Of course there would be a stop if an attorney tried a second application for a writ, and then appealed again from that refusal. He would be liable to be punished for a contempt of court.<sup>2</sup> However, it has been held several times that an appeal from an order denying the writ is a matter of absolute right.<sup>3</sup> Therefore, the only solution of the difficulty is in amendment to the sections relating to appeals and to section 766. The act of 1891, creating the Circuit Court of Appeals, does not appear to have repealed this absolute right of appeal. It seems only to affect the method, time and court to which the appeal shall be taken. Otherwise the sections in the Revised Statutes as to appeals seem to remain in force. It is believed that the judges in the Ninth Circuit share these views; but they regarded the appeal as a matter of right, and thought that it would be better not to deny the appeal, but let the Supreme Court pass upon the mooted question. They, however, declined to grant any stay of execution. The attorneys for the petitioner claim, of course, that the pendency of the appeal, under section 766, operates *ipso facto*, as a stay.

<sup>1</sup> Worden also appealed, out of an abundance of caution, to the Circuit Court of Appeals.

<sup>2</sup> See in this connection what the Supreme Court said in the case of

Jugiro, 140 U. S. 291, where a second application and appeal was taken.

<sup>3</sup> In *re Sun Hing*, 24 Fed. Rep. 728; *Ex parte Jugiro*, 44 Fed. Rep. 755.

ANDREW JACKSON AND EDWARD LIVINGSTON.—Apropos of the address upon Andrew Jackson elsewhere published, it may not be amiss to refer to the intimate relations which the great soldier sustained to one of the greatest lawyers of his time. The publishers of "Appleton's Encyclopedia of American Biography" employed Charles Haven Hunt to write up the "Livingstons," which he accordingly did.<sup>1</sup> In doing that work, he became so much interested in the career of Edward Livingston that, in 1864, he wrote an extended "Life," a volume of 439 pages, to which Geo. Bancroft wrote an Introduction; and the figures below given are to pages of the latter work.

The Livingstons have sometimes been derisively spoken of by their political enemies, as "The Royal Family of New York."

The family is of Scottish blood, and traces its descent from Sir Alexander Livingstone, who, in 1487, was made one of two joint Regents of Scotland, on the death of James I, during the minority of James II.

Robert Livingston, founder of the American branch, settled at Albany in 1675, having then just reached majority; he married a daughter of the Schuyler family, then and for generations afterwards one of the most prominent in the Colony of New York. Between 1683 and 1686, he acquired, by successive purchases from the Indians, lands aggregating 160,000 acres (some twenty miles east and west by twelve miles north and south), stretching from the Hudson river, a few miles south of Hudson, New York, to the Massachusetts boundary, and including a part of the counties of Columbia and Dutchess. The colonial Governor, Dongan, approved the purchase; and, July 22, 1686, patented the lands to Livingston, as the "Lordship and Manor of Livingston," but reserving to the Crown a yearly rental of twenty-eight shillings. Livingston was given the advowson of all churches; and was authorized to hold a court baron and court leet. In 1715 this grant was confirmed by Geo. I, by a royal charter, which conferred upon the Lord of the Manor the further privilege of membership in the colonial Legislature. Now, as a matter of fact, the Livingstons were permitted to exercise these special privileges, and did so, for 104 years. Robert Livingston, first Lord of the Manor, had three sons: Philip, born in 1686; Robert, born in 1688; and Gilbert, born in 1690. Gilbert was given a separate estate, in Saratoga. In order to provide for the second son, Robert, 13,000 acres were detached from the southern part of the original grant; and the part thus detached was erected into the "Lower Manor," or, as it is much better known in American history, the

<sup>1</sup> Volume 8, page 746.

"Manor of Clermont" — and, subsequent to 1790, as simply Clermont. The lands not detached, descended to Philip, who became second Lord of the Manor.

His eldest son, Robert, born in 1710, became third Lord of the Manor; but just before his death, in 1790, divided the estate equally among his children — against the protest of his eldest son. From the Clermont branch came Robert R. Livingston, and his younger brother, Edward, the subject of this inquiry. Robert R. Livingston, though but twenty-nine years old, acted with Adams, Franklin, Jefferson and Sherman in framing the Declaration, but was called home to New York, before he had an opportunity of signing it. He was afterwards the first Chancellor of the State of New York.

Edward Livingston was born at Clermont, May 26, 1764, and was twelve years old when his brother helped frame the Declaration. In 1781 he graduated from Princeton, and entered the office of John Lansing, afterwards second Chancellor of New York. January, 1785, he was admitted; his fellow-students were Burr, Kent and Hamilton; and from the first, he gave special attention to the civil law; he settled in New York City, where he ranked with Burr, Kent and Hamilton.

In 1794, 1796, and 1798, he was elected to Congress, where he first met Andrew Jackson, and they voted together on nearly all questions.

He opposed the alien and sedition laws; and by his intimacy with Jackson and Jefferson incurred the enmity of Burr, Hamilton, and Marshall. He was one of six New York members who voted for Jefferson, while the other four members voted for Burr.

Jefferson made him United States Attorney at New York City; and soon afterwards he was elected Mayor. By the fraud and embezzlements practiced by a clerk employed in the District Attorney's office, Livingston suddenly found himself largely indebted to the general government; at that time the District Attorney being the government agent for disbursing all funds appropriated for court expenses. He promptly confessed judgment in favor of the United States, for the sum of \$100,000, though, as a matter of fact, later investigations proved the actual shortage to be only \$43,666.02. In order still further to secure the government, he assigned and conveyed everything, personal and real, to a trustee.

This judgment was kept hanging over his head until released by President Jackson, many years later. Just before these financial reverses came upon him, he had lost his wife, who left two children; these he placed with his eldest sister, Gen. Montgomery's widow. But this defalcation, which Jefferson could not, or would not, understand,

seems to have been the beginning of Jefferson's hostility toward Livingston.

The latter, having made restitution to the extent of his whole estate, and having provided for the education of his infant children, sent his resignation as Mayor in to Governor Clinton, which the latter accepted, though very reluctantly. Having done all these things, he quitted New York, in the last week of December, 1803, with but \$100 in his pocket, and letters of credit for the further sum of \$1,000, all now remaining of his once princely fortune. His destination was New Orleans, which he reached February 7, 1804.<sup>1</sup>

It should have been observed in its logical connection that the entire Livingston family were prime favorites with Lafayette; their house was his home, and they were kindly disposed toward everything French; indeed, it was this very disposition which ruined Livingston financially; the defaulting and absconding clerk was a French refugee, who had worked on his sympathies, and wormed into his confidence. But his familiarity with the French language and literature, and his thorough knowledge of the civil law, a knowledge far surpassing that of Chancellor Kent, stood him in good stead when he located in New Orleans.

At the April term of the Governor's court he tried six causes, and twenty-nine causes at the May term; addressing a jury in either French, German or Spanish, and sometimes in all three; he at once took his place at the head of the profession, and kept it while he lived. Among his first clients was one Jacob Gravier, who brought an action against the city, to quiet his title and possession of a large tract of river frontage; in payment of his fees, Livingston took part of this land and held it until forcibly ousted by order of Jefferson. This is the famous "Batture" case, one of the most readable to be found in the American books, but somewhat beside this inquiry.<sup>2</sup>

Before passing on, however, it may not be amiss to observe, with reference to the Batture case, that after it had estranged Jefferson and Livingston for many years, they became reconciled in their old age (precisely as Adams and Jefferson did). Indeed, on the occasion of his last appearance in court, *New Orleans v. United States*,<sup>3</sup> in which he was senior and Webster was junior counsel, Livingston referred touchingly to his early friendship for Jefferson, their estrangement, and reconciliation, concluding thus: "I could not avoid using this occasion

<sup>1</sup> Page 110.

203; *s. c.* 15 Fed. Cas. 660; 4 Hughes,

<sup>2</sup> *Livingston v. Jefferson*, 1 Brock. 606.

<sup>3</sup> 10 Pet. 661.

of making known that I have been spared the lasting regret of reflecting that Jefferson had descended to the grave with a feeling of ill will towards me."

Livingston and Jackson, who had parted as warm personal and political friends, when the latter quitted Congress and took his place on the Bench, met again on the eve of the battle of New Orleans; their early friendship was renewed, and continued unabated while they lived.

Livingston was among the first to become solicitous about the safety of New Orleans; early in September, 1814, a mass meeting of citizens was held, at which he presided, and which he addressed; that meeting appointed a Committee of Safety, placing him at its head, from which time he was constantly in communication with General Jackson. When the latter reached the city, December 2, 1814, and was met by a deputation, he responded briefly to their address of welcome, but his remarks were in English, and utterly failed to awaken enthusiasm or interest. Grasping the situation, Livingston rendered the response in French, whereupon the crowd became wild with enthusiasm, rending the air with cries of "*Vive Jackson.*" "*Vive notre General.*" There and then old Hickory seems to have taken Livingston to his very heart of hearts; and to have trusted him, thenceforth, as he trusted no other living man. Young Lewis Livingston, Edward's only son, was placed on Jackson's staff, with the rank of Captain; the father at the same time became a volunteer aid, with the rank of Colonel; and becoming, to use the words of his biographer, at page 198, "aid-de-camp, military secretary, interpreter, orator, spokesman, and confidential adviser upon all subjects."

Sunday, December 18, 1814, Jackson reviewed all his troops, in the public square; and his address to them was read, in German, French, and in Spanish, by Livingston. Both father and son shared all the dangers of the campaign; the father's influence with the General being sufficient to induce him to accept the re-inforcements tendered by Lafitte, the pirate. Long after the battle, and when about to quit New Orleans, Jackson sat for his miniature, painted on ivory. This he presented to his favorite, with the following indorsement, in his own hand writing: —

HEADQUARTERS, NEW ORLEANS, May 1st, 1815.

Mr. E. Livingston is requested to accept this picture, as a mark of the sense I entertain of his public services, and as a token of my private friendship and esteem.

ANDREW JACKSON.

Livingston resumed his practice, when the war closed, and followed it closely until he was again sent to Congress. Beginning December, 1823, he represented New Orleans for three consecutive terms; and,

under date of April 24, 1824, Jefferson sent him a letter of the warmest, most friendly congratulation.

At the time Livingston quitted New York for New Orleans, the firm of Dunham & Davis held a demand against him, which they reduced to judgment, and then assigned the judgment to Burr.

In July, 1806, Burr gave Doctor Bollman a written order on Livingston, for the payment of \$1,500, without specifying that it was in payment of this judgment debt. These papers came to the knowledge of Gen. Wilkinson, and, on the strength of them, he sought to connect Livingston with Burr's conspiracy, and made an unsuccessful effort to have him arrested.<sup>1</sup>

In 1826, Livingston paid his old debt to the United States, by selling to the general government some of his New Orleans lands; and when these facts afterwards came to the knowledge of President Jackson, he peremptorily ordered his Secretary of the Treasury to discharge the old judgment; this was done, and Jackson's enemies made a vast amount of political capital out of it — or attempted to do so.

Jackson and Livingston both resided in Washington during 1823, 24, 25, and were more intimate than ever. During that period Jackson was understood to be a candidate for the presidency, and was criticised accordingly, more especially for having declared martial law in New Orleans, and for continuing it unreasonably. Livingston was well-known to have been in his confidence at that time, and continuously thereafter. Very many inquiries were addressed to Livingston, by men who seemed honestly desirous to learn the real facts; and among such inquirers was Timothy Pickering. To him, Livingston replied as follows: "During that time, I enjoyed his (Jackson's) confidence, which I should esteem it one of the greatest misfortunes of my life to have been at any time since deprived of. I think, therefore, that I know him well. I have seen him in circumstances of most extraordinary difficulty, amidst the greatest dangers and perplexities, and in the hour of victory and triumph, and witnessed the resources, the energy, firmness, courage, and moderation which distinguished his whole conduct in these several situations — conduct always adapted to the occasion which rendered it necessary, without the slightest attention to the effect which his measures might have upon himself. I am not writing his panegyric, or I could give instances of all that I allege. I am giving what you asked, my honest opinion."

During his six years in Congress, Livingston paid but one visit to New Orleans. During the campaign of 1828, he put in all his time for

<sup>1</sup> See page 130.

Jackson, in Pennsylvania, and further north, utterly neglecting his own fences — and he was defeated for re-election.

Livingston was defeated at the polls in November, 1828; but at once on the meeting of the legislature he was elected to the Senate, taking his seat the day Jackson was inaugurated. From that time on he seems to have been the most trusted, as he was certainly the most able friend of the administration, supporting all its leading measures on the floor of the Senate. Jackson offered him the French mission, which he declined.

April 9, 1831, he received a letter from Van Buren, saying the President wished him to quit Montgomery place (which had been recently left to him by his deceased sister, the widow of Gen. Montgomery), and to come secretly to Washington, without letting any one know his destination. On reaching Washington he learned that it had already been decided that Van Buren should retire from the cabinet, and that he was to be succeeded by Livingston, as Secretary of State. This united him more closely to Jackson; indeed, the biographer claims that papers now in the possession of Livingston's granddaughter, some in the handwriting of Jackson, others in that of Livingston, show that the drafting of all important State papers was intrusted to the latter, and the following documents tend to prove that claim:—

FOR THE CONCLUSION OF THE PROCLAMATION.

Seduced as you have been, my fellow-countrymen, by the delusive theories and misrepresentations of ambitious, deluded, and designing men, I call upon you in the language of truth, and with the feelings of a father, to retrace your steps. As you value liberty and the blessings of peace, blot out from the page of your history a record so fatal to their security as this ordinance will become if it be obeyed. Rally again under the banners of the Union whose obligations you, in common with all of your countrymen, have, with an appeal to heaven, sworn to support, and which must be indissoluble as long as we are capable of enjoying freedom. Recollect that the first act of resistance to the laws which have been denounced as void by those who abuse your confidence and falsify your hopes in treason, subjects you to all the pains and penalties that are provided for the highest offense against your country. Can the descendants of the Rutledges, the Pinckneys, the Richardsons, the Middletons, the Sumpters, the Marions, the Pickens, the Brantons, the Taylors, the Haynes, the Gadsdens, the Winns, the Hills, the Henshaws, and the Crawfords, with the descendants of thousands more of the patriots of the Revolution, that might be named, consent to become traitors? Forbid it, heaven!

Accompanying the above quotation, Livingston's papers show two letters, both in Jackson's handwriting, as follows:—

DEC. 4, 1832, 11 o'clock, p. m.

DEAR SIR:

I submit the above, as the conclusion of the Proclamation, for your revision and amendment. Let it receive your best flight of eloquence, to strike to the

heart and speak to the feelings of my deluded countrymen of South Carolina. The Union must be preserved without blood, if this be possible; but it must be preserved at all hazards, and at any price.

Yours with high regard,

ANDREW JACKSON.

E. LIVINGSTON, Esq.

FRIDAY, at night, Dec. 7th.

MY DEAR SIR:

Major Donelson, having finished copying the sheets handed by you about 4 o'clock, p. m. to-day, is waiting for the balance. Such as are ready, please send, sealed, by the bearer. The message having been made public on the 4th, it is desirable, whilst it is drawing the attention of the people in South Carolina, that their minds should be drawn to their *real situation*, before their leaders can, by false theories, delude them again. Therefore, it is to prevent blood from being shed and positive treason committed, that I wish to draw the attention of the people of South Carolina to their danger, that no blame can attach to me by being silent. From these reasons you can judge of my anxiety to have this to follow the message.

Yours respectfully,

ANDREW JACKSON.

E. LIVINGSTON, Esq.

Secretary of State.

The final mark of Jackson's unbounded trust in Livingston appears to have been his special mission to France, growing out of the fact that the French Chamber persistently refused to appropriate the money due the United States, under the Treaty of July 4, 1831. President Jackson insisted on the payment of the money, and Louis Philippe excused himself, on the ground that he had no money, that none had been appropriated, etc. May 29, 1833, Livingston resigned as Secretary of State, and on the same day Jackson commissioned him as Special Envoy, to adjust the dispute with France, which he accomplished successfully.

G. C. W.

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**EFFORT TO PURCHASE THE RELICS OF ANDREW JACKSON.**—The home of Andrew Jackson, known as the Hermitage, situated in the upland country at a considerable distance from the Cumberland river, eleven and a half miles east of Nashville, Tenn., was, prior to the civil war, purchased by the State of Tennessee at a cost of something in excess of \$40,000, for which bonds of the State were issued, which bonds, or their renewals, still form a part of the funded debt of Tennessee. The purchase included only the real property. The furniture and relics of the great General passed, in due course of succession, to his adopted grandson, Colonel Andrew Jackson, now living at Cincinnati, Ohio. The State of Tennessee appropriates but fifty dollars a



month to keep the Hermitage protected from dilapidation, and this barely supports a peasant family, who reside there, together with an ancient negro, once a servant of General Jackson, who claims to have been born in 1803, but who was probably born some years later. The Hermitage Mansion, built of brick, stands substantially as it stood when General Jackson died in it in the year 1845. The old Hermitage, consisting of logs, a cabin of but two rooms and but a story and a half high, together with another detached log cabin which served as a kitchen, still stands, though necessarily renewed and restored. This is a far more interesting relic than the new Hermitage; for in it Jackson extended his hospitality to such distinguished guests as Aaron Burr, the Marquis de La Fayette, and one of the sons of Daniel Boone. In one of the detached buildings of the old Hermitage, occupied by the colored servants of Jackson, the ancient servitor of the great General, still living and pleading for his "dram," was undoubtedly born. This man is by far the most interesting relic of any left behind by Andrew Jackson. We subjoin an accurate portrait of him as he looks to-day. He cannot read, but nevertheless he has been so trained that he bows reverently over the tomb of Mrs. Jackson and professes to read upon the horizontal slab the inscription which General Jackson composed and caused to be engraved and placed there:—

Here lie the remains of Mrs. Rachel Jackson, wife of President Jackson, who died the 22d of December, 1828, aged sixty-one years. Her face was fair, her person pleasing, her temper amiable, her heart kind: she delighted in relieving the wants of her fellow creatures, and cultivated that divine pleasure by the most liberal and unpretending methods; to the poor she was a benefactor; to the rich an example; to the wretched a comforter; to the prosperous an ornament; her piety went hand in hand with her benevolence, and she thanked her Creator for being permitted to do good. A being so gentle and so virtuous slander might wound, but could not dishonor; even death, when he bore her from the arms of her husband, could but transport her to the bosom of her God.

This venerable relic will soon be laid away from human sight. The log cabins of the old Hermitage will again rot and crumble into the earth, and may not be restored. These reflections increase the desire to have the relics of Andrew Jackson purchased and restored to the country seat which he built for himself when a Major-General of the armies of the United States, and wherein he spent, during his intervals of repose from his public duties, his latest years. To accomplish this result — to restore these relics to the place from whence they were taken — to restore the Hermitage as it was when General Jackson left it for mansions on high,— The Ladies' Hermitage Association, of Nashville, was duly

chartered and organized in 1889. The State legislature conveyed to it, through a board of trustees, the house in which General Andrew Jackson lived, the tomb which marks his last resting-place, and twenty-five surrounding acres, to beautify and preserve throughout all coming ages, in perpetual memorial of the great man who lived there through forty-one years of his eventful life, and whose ashes now repose beneath



**THE ANCIENT SERVITOR OF ANDREW JACKSON.**

that soil. Finding the place in a state of extreme dilapidation, the association has, for the past eight years, put forth its efforts to restore the mansion, grounds and tomb to their original beauty. So much has been done in the way of restoration that now the association feels that it can bend its energies toward the purchase of the Jackson relics, consisting of furniture, portraits, historical mementoes, etc., which are

now offered to the association. To accomplish this, the association calls upon all patriotic and generous citizens to contribute to this cause. Sums small or large will be gratefully received and acknowledged.

The board of directors of the association comprises a number of distinguished ladies of Nashville: Mrs. Mary L. Baxter, regent; Mrs. Albert L. Marks, first vice-president; Mrs. J. B. Lindsley, second vice-president; Mrs. Mary C. Dorris, secretary; Mrs. R. G. Thorne, Mrs. A. M. Shook, Mrs. J. C. Gaut, Mrs. J. M. Dickinson, Mrs. M. S. Cockrill, members; and Mrs. P. H. Manlove, cashier. A popular subscription ought to be started throughout the entire country to aid in this most worthy object. It ought not to be limited in amount, but it ought to be understood that a ten cent subscription from the school children who desire to learn a lesson in patriotism will be more acceptable than a hundred dollar subscription from a rich man who gives it to get rid of some one who importunes him for it. It ought to be recalled that Andrew Jackson was a man, who, in public and in private life, was absolutely honest; who never proposed a measure or did an act except from the most sincere motives, and wholly without regard to the consequences of his proposal or his act upon himself; who never fought a battle that he did not win; who never promoted a public measure in which he did not succeed; who, in the greatest crisis in our country's history, illustrated his patriotism, not by words but by deeds; who did something; who defended our southern coast against the greatest expedition that had ever been launched against us; who defeated the British, not in one, but in four battles,—and who compelled them to decamp from our coasts and retreat to their ships; who in every controversy was on the side of popular right; and who, in the upward course of his career, resigned six of the highest offices which his State or country could bestow upon a citizen: a name entitled to rank with that of Leonidas and Washington and Cincinnatus; a name which will grow greater and brighter with each receding age. The country seat, where he lived and died in patriarchal simplicity, ought to be rehabilitated with the furniture which he used, and with everything, so far as may be, that was his. The patriotic ladies whose names are above given have succeeded in purchasing his state carriage and also enough of his furniture to restore one room of the Hermitage. Their funds are now exhausted. They call upon the American people for a patriotic subscription. Subscriptions should be sent to Mrs. Mary C. Dorris, Secretary of the Ladies Hermitage Association, Nashville, Tenn.

## NOTES OF RECENT DECISIONS.

**CONTRACTS: ILLEGAL RESTRAINT OF TRADE — BY-LAW OF ASSOCIATIONS OF BUILDERS REQUIRING MEMBERS TO PAY THE ASSOCIATION A PERCENTAGE UPON ALL CONTRACTS.**—In the case of *Milwaukee &c. Asso. v. Niezerowski*,<sup>1</sup> the Supreme Court of Wisconsin, in a learned opinion by Pinney, J., hold that the by-laws of a masons' and builders' association, the membership in which includes sixty out of seventy or seventy-five mason contractors in a city, which require the members to pay to the association six per cent on all contracts taken by them, and to submit all bids for work first to the association, and provide that the lowest bidder shall add six per cent to his bid before it is submitted to the owner or his architect, are contrary to public policy, and void. The ground of the decision is that the by-laws constitute an unreasonable restraint of trade.

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**CONSTITUTIONAL LAW: A NEW VERSION OF LIBERTY.**—In the case of *Allgeyer v. Louisiana*,<sup>2</sup> the Supreme Court of the United States, at the last term, held that the word "liberty," as used in the Fourteenth Amendment of the Federal constitution, comprehends not merely the right to freedom from physical restraint, but also the right "to pursue any livelihood or calling; and, for that purpose, to enter into all contracts which may be proper." This decision is unquestionably in line with the drift of modern American judicial thought, and it is another step in advance in the general progress of the courts toward a general superintendence of the legislative department of governments, Federal and State. We have not the least idea that this interpretation of the word "liberty" was in the brain of a single member of the Congress of the United States that voted to propose the Fourteenth Amendment to the States for adoption, or in the brain of a single member of any State legislature that voted to adopt it. It is putting a new interpretation upon an old word. The word has come down in our American constitutions from Magna Charta, and in that venerable instrument it was always understood to mean freedom from bodily restraint, and nothing else. It is perceived that under this new doctrine the courts

<sup>1</sup> 70 N. W. Rep. 166.

<sup>2</sup> 165 U. S. 578; s. c. 17 Sup. Ct. Rep. 427.

are going to set aside every act of the legislature which restrains the liberty to "enter into all contracts which may be proper;" and the courts will accordingly decide, contrary to the opinion of the legislature, what contracts are "proper" and what are not "proper." This is nothing more or less than applying to sovereign legislation the rule which the courts of judicature apply to the by-laws of private corporations, the rule of upholding them when they are reasonable—that is to say "proper," and of setting them aside when they are unreasonable—that is to say, improper. It is an assumption of legislative power, and ought to be promptly resisted.

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**NEGLIGENCE: EVIDENCE OF NEGLIGENCE WHERE POULTRY MOLDS IN COLD STORAGE.**—In the case of *Leidy v. Quaker City Cold Storage Co.*,<sup>1</sup> the Supreme Court of Pennsylvania hold that evidence that poultry, when put in cold storage, was in good condition, that it was molded when taken out; that there was moisture in the room where it was kept; and that this would produce mold,—warrants recovery against the warehouseman, without proof of any specific act of negligence producing the moisture.

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**CONSTITUTIONAL LAW: BILLS FOR RAISING REVENUE TO ORIGINATE IN HOUSE OF REPRESENTATIVES—THE NATIONAL BANKING ACT.**—In the case of *Twin City Nat. Bank v. Nebecker*,<sup>2</sup> a serious attempt was made to overthrow the section of the National Banking Act of 1864, which lays a tax upon the average amount of the notes of a national banking association in circulation, on the ground that the section was a revenue bill, and, having been added to the bill in the Senate, before it became a law, it had not been passed in conformity with that clause of the constitution which provides that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills."<sup>3</sup> The Supreme Court were unable to take this view. It is only where the main purpose of the bill is to raise revenue that it must originate in the House, under this provision. Where the main purpose of the bill is something else and the raising of revenue is merely an incident, the bill, or the portion of it which lays the tax, may originate in the Senate.

<sup>1</sup> 36 Atl. Rep. 851.

<sup>3</sup> Const. U. S. Art. 1, Sec. 7.

<sup>2</sup> 17 Sup. Ct. Rep. 766.

**DECEIT: FALSE STATEMENTS OF BANK DIRECTORS DECEIVING DEPOSITORS.**—The principle that, in order to sustain an action for damages grounded upon fraud, the two elements of fraud and damage, must concur, and that there can be no action for fraud without damage, or for damage without fraud, is well illustrated by the decision of the Circuit Court of Appeals of the United States for the 6th Circuit, in the case of *Brady v. Evans*,<sup>1</sup> in which the opinion of the court is written by Mr. Circuit Judge Taft. The court hold that, in an action of deceit against the directors of a bank for making false statements as to its condition, whereby the plaintiff was induced to leave in the bank a deposit, previously made, which was lost by the failure of the bank, it is not sufficient to allege that the plaintiff was induced to remain a depositor by the statements so made, but it must be directly averred that, but for such statements, he would have withdrawn his deposits before the failure of the bank.

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**ACCIDENT INSURANCE: TEMPORARILY ENGAGING IN A HAZARDOUS EMPLOYMENT.**—In the case of *Hess v. Preferred Masonic &c. Asso.*,<sup>2</sup> the Supreme Court of Michigan (Grant, J., dissenting) hold that a banker, who, while in a sawmill to get some boards sawed for a cabinet to be used in the bank, operates a saw to cut off some pieces for handles, is not within the provision of an accident policy declaring it void as to accidents occurring when engaged in any profession, employment, or exposure not rated in the policy as a preferred occupation; he not being engaged in sawing as a business.

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**CLERKS OF COURT: LIABLE FOR NEGLIGENCE TO ISSUE PROCESS.—MEASURE OF DAMAGES.**—It is very seldom that we have occasion to review the judgment of a court upon the question what would have been done if a writ of error had issued in a particular case, assessing damages to the extent of what the plaintiff in error would have gained if he had succeeded in reversing the judgment of the court below or in reducing it. The query naturally arises whether such damages are not too remote for estimation. We find, however, that in the case of *Baltimore &c. R. Co. v. Weedon*,<sup>3</sup> it is held that in an action against the clerk of a court for failing to issue process in error to review a judgment against the plaintiff, when legally required to do so by proper proceedings on the plaintiff's part, the measure of damages is, *prima*

<sup>1</sup> 78 Fed. Rep. 558.<sup>2</sup> 70 N. W. Rep. 460.<sup>3</sup> 78 Fed. Rep. 584.

*facie*, the amount of the judgment which the plaintiff has been obliged to pay, but the defendant may show, in mitigation of damages, that, even if the plaintiff had had an opportunity to review the judgment, he would have been unable to reduce the recovery against him. The court also held, Mr. District Judge Hammond dissenting, that in such an action it is no defense that the plaintiff did not give attention to the clerk's performance of his duty and see that it had been performed, since the plaintiff was not guilty of contributory negligence by reason of having relied upon the assumption that the clerk would do his official duty.

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**INJUNCTION: PROTECTING THE PURCHASER OF AN INTEREST IN A NEWSPAPER — ENFORCING A CONTRACT THAT THE PURCHASER SHALL BE EDITOR AND MANAGER.**—The case of *Jones v. Williams*,<sup>1</sup> carefully noted by us in a former issue of this publication,<sup>2</sup> which involved the protection by an injunction of a contract whereby the complainant became the editor and manager of the newspaper known as the *St. Louis Post-Dispatch* at a fixed salary, and also an interest in the profits, was argued before the Supreme Court of Missouri sitting in banc, and the decision of Judge Valliant, noted by us, was affirmed, Sherwood and Robinson, JJ., dissenting. The opinion of the court is written by Mr. Justice Macfarlane. The court hold that the plaintiff had such an interest in the contract subsisting between himself and the Pulitzer Publishing Company as ought to be protected by an injunction. Upon this subject the learned judge said:—

The law is well settled that personal contracts for service will not, because they cannot, be enforced by courts of equity. But we do not view the duties to be performed by plaintiff under the contract as mere personal service or simple employment. In his control and management of the paper he knows no master or employer. He is answerable to no one for the manner of performing his duty. He is accountable only for the stipulated results. His position gives him a property right in the possession, control and management of the paper he agrees to edit and manage. A reading of the contract will show that the central idea of the executory part of it is the control and management of the paper. That means the possession and use of the property, and not mere employment to write editorials.

The real stress of the case was whether the contract, which was not made with the corporation known as the Pulitzer Publishing Company, which was the legal owner of the newspaper, but with Mr. Pulitzer in person, the owner of a majority of its stock, was binding upon the cor-

<sup>1</sup> 89 S. W. Rep. 486.

<sup>2</sup> 30 Am. Law Rev. 423.

poration. The court held that it had been ratified by the corporation by its conduct, and that it was hence binding. Although the holding of the court on this question has caused a considerable contrariety of professional opinion, yet there would be little reason to doubt its soundness, but for a powerful dissenting opinion by Mr. Justice Sherwood, concurred in by Mr. Justice Robinson.<sup>1</sup> This will be, for a long time to come, a leading case on the doctrine of ratification by corporations.

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CONSTITUTIONAL LAW: FEDERAL AND STATE JURISDICTION — STATE CONVICTIONS OF PERSONS ACTING UNDER AUTHORITY OF THE UNITED STATES — FEDERAL WRITS OF HABEAS CORPUS TO RELEASE SUCH PERSONS.—The decision of Mr. Federal District Judge Shiras, rendered in June last,<sup>2</sup> has attracted considerable attention from the fact that the ruling judge issued the *habeas corpus* to release from the custody of an officer of the State of Iowa a prisoner who had been convicted of a statutory crime in one of the courts of that State and whose conviction had been affirmed by the Supreme Court of that State. Briefly stated, Waite was a United States pension examiner, detailed to investigate certain pension frauds which had been committed in Iowa, one of them relating to the pension claim of a man named Andrus. Waite was indicted under a statute of Iowa for maliciously threatening to accuse Andrus of a crime in order to compel him to do an act against his will.<sup>3</sup> It appears to have been unquestioned that if Waite made any threat against Andrus it was made within the scope of Waite's office and conduct as pension examiner. Waite was convicted, appealed to the Supreme Court of Iowa, and the judgment was affirmed.<sup>4</sup> From an imprisonment under the sentence thus affirmed, Mr. District Judge Shiras released him on *habeas corpus*. The opinion of the learned judge is long, and possibly it involves repetitions of the central idea; but this is intended to bring it out and make it entirely clear. It is in all respects an admirable opinion, and vindicates the action of the court in the premises. It proceeds upon the well-known and oft-affirmed principle that the authorities of a State cannot lay hands upon the officers or agents of the United States in the discharge of their official duties; otherwise the execution of the laws of the United States would depend upon the comity and concurrence of the

<sup>1</sup> For this dissenting opinion, see 40 S. W. Rep. 353.

<sup>2</sup> In re Waite, 81 Fed. Rep. 359. The

opinion is also published in full in the Minneapolis Tribune for June 20.

<sup>3</sup> Code of Iowa, § 3871.

<sup>4</sup> State v. Waite, 70 N. W. Rep. 596.



State governments. It proceeds on the further ground that it is not competent for one of the States to make a crime against the laws of the State out of an act which is within the plane of the operations of the government of the United States. The Iowa statute, therefore, had no just application to a case where the person was acting as an officer of the United States and under color of his authority as such. But if he committed a wrong against a citizen of Iowa while so acting, that wrong was to be redressed in a Federal, and not in a State tribunal. Aside from the fact that the conclusion of the learned judge is supported by direct authority of the Supreme Court of the United States,<sup>1</sup> it is clearly vindicated by his reasoning, from which we take the following extracts:—

Broadly stated, it involves the proposition, whether the operations of the government of the United States, in matters within its sole control, and which operations of necessity must be carried forward by means of officers and agents duly appointed, can be interfered with by criminal proceedings, instituted in the State courts and based upon acts done by such officers or agents within the scope of the duties imposed upon them. By this it is not meant to assert that because a person is an officer or agent of the Federal government, he is thereby excepted out from the jurisdiction of the State or the binding force of its laws. The mere fact that when the acts by him done, were done, he was an officer of the United States, charged with certain duties to that government, will not afford him immunity from prosecution under the laws of the State, nor will the mere fact that he claims that the acts done were within the line of his official duty afford him protection, if the acts are such as to show that the claimed immunity is a mere subterfuge, and that under no fair consideration of his official duty could he have assumed that he was acting in his official capacity, when the acts complained of were done by him. But when an officer of the United States is charged with the performance of certain duties, under the laws of the United States, and in the general performance thereof he does acts which it is claimed are in excess of his proper duty, or which are violative of the rights of other citizens, the question is whether a prosecution therefor can be sustained in the State courts, when it is apparent that the institution and maintenance thereof may interfere with the enforcement of the laws of the United States or with the operation of that government. Under this aspect of the question the point is not what the rights of individual citizens might require for their proper protection, but whether the government of the United States, acting in the interest of the entire community, has not the right to assert that its operations within the jurisdiction conferred by the constitution, and wherein it is supreme and paramount, cannot be interfered with under the laws of the State and that to prevent such interference it must be held that an officer or agent of the United States, when engaged in the performance of his official duties, is not amenable to the laws or courts of the State, in a criminal proce-

<sup>1</sup> *Martin v. Hunter*, 1 Wheat. (U.S.) 363; *Tennessee v. Davis*, 100 U. S. 257; *Re Nagle*, 135 U. S. 1; *Re Loney*, 134 U. S. 372.

cution based upon acts by him done in connection with his official duties. If in the performance of these duties, the officer so acts as to violate his duty to the United States, that government, and not the State, is the proper party to call him to account. If the acts done are violative of the rights of individuals, a civil action for damages may be maintained or protection may be sought under the laws of the United States and thus a remedy may be afforded to the citizen without bringing the Federal and State governments into conflict or without unduly interfering with operations of that government under whose authority the officer is acting.

\* \* \* For any dereliction of duty in the mode and manner of conducting the investigation which he was empowered to make under the authority of the United States, he is amenable to the laws of the United States, but not to those of the State, for, as is said in effect by the Supreme Court in the Neagle case, acts done under the authority of the United States cannot be violations of the criminal laws of the State. Being done within the general scope of the authority conferred by the United States, the rightfulness or validity thereof cannot be tested by the provisions of the criminal statutes of the State.

Therefore when it was made to appear to the District Court of Howard County that it was sought in the case before it, to hold Edward F. Waite liable for a criminal violation of the statutes of the State, for acts by him done as a special examiner of pensions appointed under the laws of the United States, when he was engaged in the performance of the duties imposed upon him as an officer or agent of the United States, then it was made to appear to the court that it had no jurisdiction to further proceed in the case or to further restrain the liberty of the defendant therein for the reasons—

First. That it thus appeared that it was being attempted to apply the criminal provisions of the statute of the State to acts done and proceedings had under the laws of the United States creating and regulating the pension system of the United States, which system as to substance and mode of procedure, lies wholly without the plane of State jurisdiction.

Second. That it was thus made to appear that the criminal process of the State was being used to interfere with, impede and embarrass the operations of the government of the United States in connection with a subject-matter, touching which the laws of the United States are not only paramount and supreme, but touching which the jurisdiction of the United States is exclusive; and

Third. That it was thus made to appear that it was sought to subject an officer and agent of the United States to punishment under the criminal statutes of the State for acts by him done, under the authority of the United States, in connection with a subject-matter wholly within Federal control and jurisdiction.

At the end of his opinion the learned judge expressed his sense of the delicacy of the duty imposed upon him of reviewing the judgment of a State court, which had been affirmed by the Supreme Court of that State. The propriety of so doing was really the only question in the case worthy of debate. Counsel for the respondent—the Iowa sheriff having the prisoner in custody—argued that the regular and proper mode was a writ of error from the Supreme Court of the United States

to the Supreme Court of Iowa. Unquestionably, it is true that this was a regular and proper mode; but it is equally true that the mode adopted by the Federal judge was also regular and proper. The Supreme Court of the United States have formally laid down the doctrine that whether the writ of *habeas corpus* will be issued to enlarge a prisoner held under a State sentence which is violative of the Federal constitution or the Federal law, must be left to the discretion of the judge to whom the application is made for the writ; and that unless an emergency exists, he ought to refuse the writ and leave the prisoner to his writ of error. But it is plain that when an officer of the United States is arrested and imprisoned under a sentence for something done under color of his office, such an emergency does arise; otherwise his mere temporary arrest until a writ of error and supersedeas could be sued out, might embarrass the operations of the government of the United States. The case is different from the case where the prisoner is not an officer or agent of the United States, but where, as in the case of Durrant to which we have elsewhere alluded, he merely claims that his rights under the constitution of the United States were violated in the conduct of his trial in the State courts. In such a case an appeal from the highest State court to the lowest Federal court is a plain insult to the State judiciary and a gross abuse, such as was prevalent a few years ago, but which has been largely stopped. But where an officer of the United States is held under a State sentence for an act done in his official capacity, then it is clear of doubt that it is the right of the United States to have the question whether he is rightfully held brought before one of its tribunals and decided in the speediest and most direct way. The Federal writ of *habeas corpus* in relation to State process was first created by an act of Congress which grew out of the nullification proceedings in South Carolina, and the prosecution, under the laws of that State, of Federal revenue officers for executing their duties under the laws of the United States within that State. It might well have been said in those cases that the writ ought not to have been used in the case of a prisoner held under State sentence, but that such prisoners ought to have been put to their writ of error in the Supreme Court of the United States. The conclusive answer was that a writ of error is attended with such delay that the government may be seriously embarrassed by the imprisonment of its officers pending the hearing of the case in error, and that it was consequently necessary to provide a direct remedy by means of the writ of *habeas corpus*. It is true that the Supreme Court of Iowa is composed of five judges, and that a single Federal judge of *nisi prius*, overruling its decision, enlarged a prisoner held thereunder. This, indeed, looks

unseemly. It is, in substance, an appeal from the highest State court to the lowest Federal court in the State of Iowa. If the case were not that of the imprisonment of a Federal officer, the decision might well be regarded as an insult to the Supreme Court of Iowa. But it is to be said that whatever is unseemly in it that court has brought upon itself. It is extraordinary that a court composed of such learned and capable lawyers as composed the Supreme Court of Iowa should have affirmed the conviction of a Federal officer for an act done within the scope of, and exclusively with reference to his official business. Mr. District Judge Shiras, in his opinion, clearly points out that the principle upon which he proceeds has no application to a case where one who happens to be a Federal officer commits a crime against the laws of the State, while not acting within the sphere of his official authority.

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**DAMAGES FOR INJURY FROM FRIGHT CAUSED BY NEGLIGENCE.**—The New York Court of Appeals having held in a recent case<sup>1</sup> that damages cannot be recovered from an injury produced by fright caused by the negligence of the defendant, and having placed this decision upon the broad ground of public policy involved in the difficulty of making accurate proof in such cases of the nature and extent of the injury, and, secondly, upon the ground of the ground of the injury being too remote, — Mr. Algernon Sidney Norton, one of the editors of the *University Law Review*, published in New York City, takes the decision up and gives it a handsome overhauling in language which we have not the space to reprint.<sup>2</sup>

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**TELEPHONE COMPANIES: RIGHT TO OCCUPY STREETS OF A CITY ON THE GROUND OF THE LATTER BEING POST ROADS.**— It will be recalled that all public highways, including the streets of cities, towns and villages, are deemed to be post roads of the United States, within the meaning of the constitution. An act of Congress<sup>3</sup> will also be recalled, conferring upon telegraph companies the right to occupy post roads of the United States. This may be regarded as a great stretch of Federal power, when it is considered that neither at that time nor at any time since has any telegraph company been in any way connected with the public postal service. It is not perceived how Congress has the power

<sup>1</sup> *Mitchell v. Railroad Co.*, 151 N. Y. 107.

<sup>2</sup> 3 *Univ. Law. Rev.* 130.

<sup>3</sup> Act of July 24th, 1866.

to seize and appropriate the highways and streets laid out by the State for a public service in no way connected with the postal service, on the mere ground that such highways are post roads. Undoubtedly Congress would have the right to use them as post roads, and to enforce the unobstructed use of them by its mail carriers. But to do that is one thing, and to confer upon private telegraph and telephone companies the right to use them is another thing. Nevertheless, in that process of judicial sapping and mining against which Mr. Jefferson warned the American people, the right seems to have been established. It is now extended to telephone companies, so as to give such a company the right to occupy the streets of Richmond, Virginia, in virtue of the act of Congress above referred to. In the Circuit Court of the United States for the Eastern District of Virginia, in the case of the *Southern Bell Telephone Co. v. Richmond*,<sup>1</sup> it is held by Mr. Circuit Judge Goff, according to the syllabus, as follows: A corporation chartered as a telephone and telegraph company, and which maintains a telephone system through which, under contracts with its subscribers and with a company maintaining a telegraph system, its subscribers are connected with and transmit messages to the telegraph company, to be sent to points in other States and foreign countries, is entitled to the rights given by the act of Congress of July 24, 1866, to aid in the construction of telegraph lines, and, on complying with the act, has the privilege of running its lines over and through the streets of a city, which are post roads of the United States, and such city has no right to prevent it from so doing; though it must pay its due proportion of taxes, and submit to the ordinary reasonable regulations of the State and city.

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NEGLIGENCE: MASTER AND SERVANT—DEFECTIVE MACHINERY—LATENT DEFECTS—FACT OF ACCIDENT NOT PRIMA FACIE EVIDENCE OF NEGLIGENCE.—In the case of *Reynolds v. Merchants' Woolen Co.*,<sup>2</sup> the Supreme Judicial Court of Massachusetts declined to apply the maxim *res ipsa loquitur* to a case where an employé was injured through a secret defect in a machine at which he was working, for the reason that the breaking of the machine might have taken place without the interposition of any negligence on the part of the master. It appeared that plaintiff, defendant's employé, was injured by the flying apart of the cylinder of defendant's machine, which had been recently purchased of a reputable manufacturer. The evidence tended to show that the

<sup>1</sup> 78 Fed. Rep. 858.

<sup>2</sup> 47 N. E. Rep. 406.

cause of the accident was the existence of blow-holes, which could not have been detected by inspection. It was held not error to charge that the happening of the accident did not itself show negligence, since, though the machinery may have been defective, defendant may have exercised due care by the purchase thereof of a reputable manufacturer. While the decision seems to be sound, it is to be noted that there is a different rule of law in the case where the means of transportation of a carrier of passengers break down or fail, to the injury of the passenger. Why there should be a difference may not logically appear. It is founded upon public policy which places a carrier of passengers, who has human lives in his bailment, under a severe and exacting rule of care. But why the same severe and exacting rule should not obtain in the case of an owner of machinery who employs men to work by it, which when defective may be highly dangerous to them, affords a nice opportunity for casuistry.

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**CUSTODY OF CHILDREN: RIGHTS OF GUARDIANS APPOINTED IN DIFFERENT STATES.**—The rule that, in determining the question of right to the custody of a child, strictly legal rights will give way to the interest of the child, is well illustrated by the case of *Kelsey v. Green*,<sup>1</sup> recently decided by the Supreme Court of Errors of Connecticut, where it appeared that Green was appointed guardian of a minor by a court in Connecticut, where the minor had had his actual dwelling-place for several years. Kelsey was afterwards appointed guardian of such ward by a proper court in another State, where the technical domicile of the minor's father was, on the father's application. It was held that, in determining a contest between such guardians as to the custody of the minor, the court should consider the interests of the minor.

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**CONSTITUTIONAL LAW: APPLICABILITY OF STATE STATUTES REGULATING THE RIGHTS OF EMPLOYÉS TO FEDERAL COURT RECEIVERS.**—In 1890 the legislature of Ohio passed a statute, the third section of which provides that "in all actions against the railroad company for personal injury to, or death resulting from personal injury of, any person while in the employ of such company, arising from the negligence of such company or any of its officers or employés, it shall be held, in addition to the liability now existing by law, that every person in the employ of

<sup>1</sup> 37 Atl. Rep. 679.

such company, actually having power or authority to direct or control any other employé of such company, is not the fellow-servant, but superior of such other employé, also that every person in the employ of such company having charge or control of employés in any separate branch or department, shall be held to be the superior and not fellow-servant of employés in any other branch or department who have no power to direct or control in the branch or department in which they are employed." In the case of *Pierce v. Van Dusen*,<sup>1</sup> recently decided in the Circuit Court of Appeals for the Sixth Circuit, it became a question whether this statute was operative, so as to govern the rights of employés of receivers operating railroads under the appointment and control of courts of the United States. The case was tried at circuit before that very learned and excellent judge, Hon. E. S. Hammond, who resolved this question in the affirmative. His decision has now been affirmed on appeal in a very able and satisfactory opinion written by Mr. Justice Harlan, notwithstanding two State decisions which have held the contrary.<sup>2</sup>

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**NEGLIGENCE: MUNICIPAL CORPORATIONS — INJURY TO A FIREMAN THROUGH OBSTRUCTION IN STREET — LIABILITY OF CITY.**—The decision of the New York Court of Appeals in the case of *Farley v. New York*,<sup>3</sup> commends itself for its justice and good sense. The court, in substance, holds, reversing the Appellate Division of the Supreme Court and also the court of *nisi prius*, that a city is under the same obligations to keep its streets free from dangerous obstructions for the safety of its firemen when proceeding rapidly, as they must, to the scene of a fire, as for any other traveler; and, further, that a statute limiting the speed at which horses may be driven in the streets, to five miles an hour, has no application to the vehicles of the fire department on their way to fires.

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**CONSTITUTIONAL LAW: EX POST FACTO LAWS — VALIDITY OF A STATUTE DISQUALIFYING AS A MEDICAL PRACTITIONER ONE WHO HAS PREVIOUSLY BEEN CONVICTED OF A FELONY.**—In the case of *People v. Hawker*,<sup>4</sup> decided by the New York Court of Appeals in March last, it is held, by a divided court, that a statute of that State providing that no

<sup>1</sup> 78 Fed. Rep. 692.

<sup>3</sup> 46 N. E. Rep. 506; s. c. 16 N. Y.

<sup>2</sup> *Henderson v. Walker*, 55 Ga. 481; Law Jour. 148.

*Campbell v. Cook*, 86 Tex. 680, 684.

<sup>4</sup> 46 N. E. Rep. 607; s. c. 16 N. Y. Law Jour. 142.

person shall practice medicine who has ever been convicted of a felony by any court, applies to persons who had been convicted of a felony before the passage of the act. As to such persons the statute is not an *ex post facto* law, but is constitutional. Judge O'Brien dissented, on the ground that the statute operated to impose an additional punishment for an offense committed and punished at the time of its enactment, and that it was hence an *ex post facto* law and therefore unconstitutional. The dissenting opinion seems to be the sound one. If the case is carried to the Supreme Court of the United States the decision will probably be reversed.

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RECEIVERS: POWER OF, TO BORROW MONEY.—In the case of *Cake v. Mohun*,<sup>1</sup> the Supreme Court of the United States, in a case arising upon the accounts of a receiver, had occasion to consider the power of a receiver to incur fresh obligations and charge them upon the estate in his hands. The court, in a brief opinion by Mr. Justice Brown, held, in substance, that a receiver has power to incur obligations for supplies and materials incidental to the business which the court permits him to continue and carry on.<sup>2</sup> The court accordingly held that the borrowing of money by a receiver, on the furniture and other personal property in a hotel, may be authorized by the court, in order to prevent the closing of the hotel and the loss of the good-will of its business during the pendency of a suit for foreclosure.

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CONSTITUTIONAL LAW: DELEGATION OF LEGISLATIVE POWER — DELEGATION OF POWER TO PRESCRIBE MARKS ON PACKAGES OF OLEOMARGARINE.—In the case of *Re Kollock*,<sup>3</sup> the Supreme Court of the United States hold that the provision in the act of Congress of August 2, 1886, defining butter and imposing a tax upon the manufacture, etc., of oleomargarine,<sup>4</sup> that the marks, brands and stamps to be placed on packages of oleomargarine (the omission of which is made a criminal offense) shall be designated by the Commissioner of Internal Revenue, involves no unconstitutional delegation of power to determine what acts shall be criminal, since the criminal offense is fully and completely

<sup>1</sup> 17 Sup. Ct. Rep. 100; affirming *s. c.* 3 D. C. App. 60.

<sup>2</sup> Citing *Barton v. Barbour*, 104

U. S. 126, 135; and *Thompson v. Phoenix Ins. Co.*, 186 U. S. 287, 298.

<sup>3</sup> 17 Sup. Ct. Rep. 444.

<sup>4</sup> 24 Stat. 209, c. 840.



defined by the act, and the designation of the marks, brands and stamps is merely the discharge of an administrative function, needful to the operation of the machinery of the law.

**STATUTE OF FRAUDS: AGREEMENTS NOT TO BE PERFORMED WITHIN THE YEAR — AGREEMENT TO MAINTAIN A RAILWAY SWITCH.**— In the case of *Warner v. Texas &c. R. Co.*,<sup>1</sup> Mr. Justice Gray was assigned to write the opinion of the Supreme Court of the United States upon a question calling into play the learning and habit of patient research for which he is so much distinguished. The action was against a railway company upon a contract whereby the company agreed that if the plaintiff would grade the ground for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down the rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant pleaded that the contract was oral, and within the statute of frauds, because it was "not to be performed within one year from the making thereof," and because it was "a grant or conveyance by this defendant of an estate of inheritance, and for a term of more than one year, in lands." The court held, reversing the Court of Appeals for the Eighth Circuit, that the agreement was not one to be performed within a year, and that it was not a grant of an estate in land for a term of more than one year within the meaning of the Texas statute. The Supreme Court of Texas had already put a construction upon its statute in conformity with this view, holding that "an agreement which may or may not be performed within a year is not required by the statute to be in writing: it must appear from the agreement itself that it is not to be performed within a year."<sup>2</sup> And the court shows that the English statute of frauds, with a similar provision, came to this country with a similar interpretation upon it, and that such has been the generally accepted interpretation put upon it by the American courts. Upon the second contention, that this was a grant or conveyance of an estate of inheritance or freehold, or a contract for the sale of real estate, or a lease thereof, for a longer term than one year, within another clause of the Texas statute, — the court drew attention to the fact that the statute could not be made to apply to the contract in the case at bar, and that, in re-enacting the English

<sup>1</sup> 17 Sup. Ct. Rep. 147; reversing  
s. c. 18 U. S. App. 286.

<sup>2</sup> *Thouvenin v. Lea*, 26 Tex. 612.

See also *Thomas v. Hammond*, 47 Tex.  
42; *Weatherford &c. R. Co. v. Wood*,  
88 Tex. 191.

statute, the legislature of Texas had omitted the words "or any uncertain interest of, in, to, or out of" lands or tenements, and the further words "or any interest in or concerning them."

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**HOMICIDE: CRIMINAL EVIDENCE — DYING DECLARATIONS IMPEACHABLE BY CONTRADICTORY STATEMENTS OF THE DECEASED.**—In *Carver v. United States*,<sup>1</sup> the Supreme Court of the United States hold that contradictory statements, made by the deceased at the time of making a dying declaration, are competent evidence, as tending to impeach the declaration. The court also hold that the general rule, requiring, for the impeachment of a witness by proof of previous contradictory statements, a foundation to be laid by asking him whether he made such statements, does not extend to cases of dying declarations. The theory of this view is that, as the admission of dying declarations as evidence stands on a peculiar footing, the accused is entitled to any advantage he may have by reason of being deprived of the right of cross-examination.

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**CONSTITUTIONAL LAW: POLICE POWER OF THE STATES — INTERFERENCE WITH INTERSTATE COMMERCE AND WITH UNITED STATES MAIL.**—In the case of *Gladson v. Minnesota*,<sup>2</sup> the Supreme Court of the United States rule the following propositions in an opinion written by Mr. Justice Gray:—

1. A railroad aided by lands granted under an act of Congress with a provision that the road shall remain a public highway for the use of the government, free from all toll or other charge for transportation of property or troops of the United States, and that it shall transport mails at prices fixed by Congress or the Postmaster General, and permitting connection with another railroad, is not thereby exempted from the operation of a State law requiring trains to stop at a county seat.

2. A reasonable exercise of the police power of the State requiring railroad trains to stop at all stations at county seats does not take the property of the railroad company without due process of law.

3. A railroad train running between two points within the same State, although carrying passengers who are to be transferred to another train of the same company which will carry them to another State, is not exempt from a State law requiring it to stop at county seats, on the ground that this constitutes an interference with interstate commerce.

<sup>1</sup> 17 Sup. Ct. Rep. 228.

<sup>2</sup> 17 Sup. Ct. Rep. 627; affirming s. c. 57 Minn. 385.

4. A train carrying United States mails is not exempt from the operation of a State law requiring all regular passenger trains to stop at all stations at county seats.

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**RECEIVERS OF RAILROADS: LIABILITY OF REORGANIZED COMPANY FOR TORTS OF RECEIVERS.**— In *Texas &c. R. Co. v. Manton*,<sup>1</sup> lately decided by the Supreme Court of the United States, the court, affirming the court below,<sup>2</sup> held two important propositions with reference to railway receivers. The first is that a railroad company which procures or acquiesces in the withdrawal of a receivership and the discharge of the receiver and the cancellation of his bond, and accepts the restoration of its road largely enhanced in value by betterments, may be sued in assumpsit on a claim which was valid against the receiver, but not satisfied by him or by the court which discharged him, — at least when it does not claim that the amount of the betterments was less than the demand sued on. The second is that an action for damages for personal injuries received by a passenger on a railroad in the hands of a receiver, brought against the receiver and the railroad company and pending after the restoration of the property to it by the receiver, is not cut off by failure to present and prosecute the claim by intervention in the receivership case under an order requiring such claims to be presented and prosecuted by a certain date or be barred, where the property was not judicially sold or a fund realized for distribution, but was restored by the receiver to the company enhanced in value from the earnings of the road far beyond the claim of plaintiff.

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**FRAUDULENT REPRESENTATIONS AS TO FOREIGN LAW.**— The law of a foreign State or country is a *fact*, and when any right is claimed under it in a domestic tribunal it is to be proved as a fact. As the judges of the domestic tribunals do not take notice of it judicially, the unlearned citizens cannot be expected to do so. The presumption, grounded upon public policy, that every one knows the law, does not therefore apply with respect to the law of a foreign State or country. Such law being matter of fact, a misrepresentation concerning it will be a misrepresentation of a fact, and not a misrepresentation of law; and will hence constitute such a fraudulent misrepresentation as will violate a contract in favor of one who, on the faith of such a misrepresentation being true, has been induced to enter into the contract to his injury.

<sup>1</sup> 17 Sup. Ct. Rep. 217.

<sup>2</sup> 23 U. S. App. 143.

The case of *Wood v. Roeder*,<sup>1</sup> lately decided by the Supreme Court of Nebraska, furnishes an interesting illustration of this principle. The opinion was written by Harrison, J.

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**RIGHT OF TRIAL BY JURY: DOES NOT PREVENT SPECIAL FINDINGS OF FACT.**—In the case of *Walker v. New Mexico &c. R. Co.*,<sup>2</sup> it is held by the Supreme Court of the United States that a statute of a territory authorizing special findings of fact by the jury and providing for judgment upon them if they are inconsistent with the general verdict, does not violate the right of trial by jury.

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**NEGLIGENCE: CARRIERS OF PASSENGERS — DUTY TO KEEP CARS WARM.** — The case of *Taylor v. Wabash R. Co.*, recently decided by the Supreme Court of Missouri, raises what is, so far as our recollection extends, a novel question in the law of negligence. The plaintiff sued for damages incurred by reason of a severe illness, due to the cars of defendant, on which he was a passenger, being insufficiently warmed, on the theory that it is the duty of a railroad company to provide its passengers, not with bare transportation only, but with a vehicle in which they will not be exposed to a temperature so severe as to injure their health. After the evidence was in the court instructed the jury to return a verdict for the defendant. On appeal the Supreme Court, speaking through Mr. Justice Barclay, said:—

1. By accepting plaintiff as a passenger upon the train, defendant became obliged to discharge some other duties towards him beyond that of mere safe carriage to the plaintiff's destination. The principles of the common law, as applied to the circumstances of travel at this day and in this country, require of the carrier of passengers by railroad a certain measure of attention which we believe the defendant in this action did not fully meet. To quote a recent writer on this topic: "The duty of the carrier extends, not only to the furnishing of safe vehicles, but also to the supplying them with such accommodations as are reasonably necessary for the welfare and comfort of his passenger. This duty would undoubtedly include the supplying them with seats, if a day car or vehicle; with proper berths, if a sleeping car; with warmth in cold weather; with light at night," etc.<sup>3</sup> In the case at hand defendant was notified of the plaintiff's suffering from want of proper or insufficient heat in the car. Notwithstanding such notice, repeatedly given, defendant omitted to comply with

<sup>1</sup> 70 N. W. Rep. 21.

<sup>2</sup> Hutch. Carr. [Mechem's 2d ed.,

<sup>3</sup> 17 Sup. Ct. Rep. 421; affirming 1891], Sec. 515d.

s. c. 34 Pac. Rep. 43.

the demands of its duty, although it appears from the evidence that the train made many stops at stations along the route. Defendant, it may fairly be inferred, had ample opportunity to supply the needed heat, had it seen fit. Such, at least, is the showing of facts which plaintiff makes; and the truth of it, he is entitled to have submitted to the proper triers of the facts. The plaintiff's case is not founded on any claim for mere discomfort on his journey. It is founded on the theory that he ultimately suffered a severe illness and impairment of his ability to work, as a direct consequence of the cold he contracted on the ride with defendant of which he complains. His testimony tends to sustain that theory; and he was, we think, entitled to go to the jury upon it.<sup>1</sup>

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**RATIFICATION BY MUNICIPAL CORPORATIONS.** — In *Schussler v. Hennepin Co.*,<sup>2</sup> the Supreme Court of Minnesota found occasion to apply the doctrine that although a municipal corporation may not be liable originally for the unauthorized and unlawful trespass of its officers, though done *colore officii*, yet it may make itself liable by ratifying or adopting their unlawful act as by accepting and retaining the benefits of it. The case was one where the county commissioners of Hennepin County damaged the mill of the plaintiff by building a dam across the Minnehaha creek for the purpose of maintaining the water in Lake Minnetonka at a navigable height. The court held that the county could not come into court and plead that it ought to be absolved from liability for the wrong done by its officers, while attempting to uphold that wrong and persist in its continuance.

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**CONSTITUTIONAL LAW: POLICE POWER — DESTRUCTION, WITHOUT COMPENSATION, OF TREES HAVING CONTAGIOUS DISEASES.** — One of the best discussions of that branch of the police power which authorizes the destruction of substances from which contagious diseases may be communicated, without compensation to the owner, is found in the decision of the Supreme Court of Errors of Connecticut in *State v. Maine*.<sup>3</sup> The opinion is written by Mr. Justice Baldwin. It deals principally with the refusal of the court to instruct the jury that, if they should find that the *yellow*s is not a contagious disease endangering other trees, the property of others, a tree so diseased was not a public nuisance, and the statute was an invasion of the rights of property of citi-

<sup>1</sup> Citing *Turrentine v. Railroad Co.* (1885), 92 N. C. 638; *Hastings v. Railroad Co.* (1892), 58 Fed. 224; *Railway*

*Co. v. Hyatt* (1896 Tex. Civ. App.), 48 S. W. 677.

<sup>2</sup> 70 N. W. Rep., 6.

<sup>3</sup> 37 Atl. Rep. 80.

zens, etc. It is plain at a glance that this request for an instruction involved an appeal from the legislature to a jury upon a question of scientific knowledge and experience, which the legislature must be presumed to have carefully investigated before it passed the statute authorizing the public authorities to destroy trees found to be infected with this disease. The court, however, dealt with it somewhat differently. The court said that the fact that this disease existed and was one of a serious character was a fact of which the court would take judicial notice. It therefore need not be proved, since what is judicially known is regarded as established. Being an established fact for the purposes of the case, it was not to be submitted to the jury. "Judicial notice," said the court, "takes the place of proof, and is of equal force. As a means of establishing facts, it is therefore superior to evidence. In its appropriate field, it displaces evidence; since, as it stands for proof, it fulfills the object which evidence is designed to fulfill, and makes evidence unnecessary.<sup>1</sup> The true conception of what is judicially known is that of something which is not, or rather need not, unless the tribunal wishes it, be the subject of either evidence or argument — something which is already in the court's possession, or, at any rate, is so accessible that there is no occasion to use any means to make the court aware of it.<sup>2</sup> If, in regard to any subject of judicial notice, the court should permit documents to be referred to or testimony introduced, it would not be, in any proper sense, the admission of evidence, but simply a resort to a convenient means of refreshing the memory, or making the trier aware of that of which everybody ought to be aware.<sup>3</sup> The defendant therefore had no right to have the jury pass upon the danger of contagion from trees affected by the yellows, as a means of determining the constitutionality of the statute, by such verdict as they might render under the instructions of the court. It was for the court to take notice that it was a disease which might be contagious.<sup>4</sup> This being established, the validity of the statute became a matter of pure law. Police legislation for the extirpation of a disease of such a nature, which the legislative department deems dangerous to the public welfare, cannot be pronounced invalid by the judicial department by reason of any difference of opinion, should one exist, between these two agencies of government, as to the probability of such danger. If the law may be

<sup>1</sup> *Brown v. Piper*, 91 U. S. 37, 43;  
*Com. v. Marzynski*, 149 Mass. 68; 21  
N. E. 228.

<sup>2</sup> *Thayer Cas. Ev.* 20.

<sup>3</sup> *State v. Morris*, 47 Conn. 179, 180.

<sup>4</sup> *Norwalk Gaslight Co. v. Borough  
of Norwalk*, 63 Conn. 495, 525, 527; 28  
Atl. 32.

an appropriate means of protecting the public health and the agricultural interests of the State, it is for the legislature alone to determine as to its adoption. It may have been the opinion of the General Assembly that peach growers in general would abandon their business from dread of contagion from orchards infected by the yellows. In such a case, whether their apprehensions were well founded or ill founded would be immaterial, unless it also appeared that there could be no reasonable grounds for them. A widespread apprehension throughout the community justifies itself, and is a sufficient basis for legislative action towards the removal of the cause, real or supposed, of the danger apprehended, when this cause is a deadly disease of a food-producing tree.<sup>1</sup> The destruction of the infected trees by order of a public official, after due inspection, is a remedy, which, however severe, is one appropriate to the end in view, and may properly be enforced without any preliminary judicial inquiry, as well as without any compensation to the owner for resulting loss."<sup>2</sup>

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**PRINCIPAL AND SURETY: SUBROGATION—SUBROGATION OF SURETY TO THE RIGHTS OF THE UNITED STATES AS PRINCIPAL.**—In the case of *Prairie State National Bank v. United States*,<sup>3</sup> the Supreme Court of the United States, in a learned and satisfactory opinion by Mr. Justice White, held that a surety who completes a contract with the United States on the contractor's default is subrogated to the rights which the United States might assert against a fund created by the retention of 10 per cent of the sums estimated from time to time as the value of the work done, in order to insure its completion; and this right relates back to the making of the contract, and is superior to any equitable lien asserted by a bank for moneys advanced to the contractor without the surety's knowledge before he began to complete the work.

<sup>1</sup> *Bissel v. Davison*, 63 Conn. 188, 191; 82 Atl. 848.

<sup>2</sup> *Citing State v. Wordin*, 56 Conn. 216, 226; 14 Atl. 801; *Powell v. Penn-*

*sylvania*, 127 U. S. 678, 685; 8 Sup. Ct. 992, 1257.

<sup>3</sup> 17 Sup. Ct. Rep. 142.

## BOOK REVIEWS.

**SMITH ON RECEIVERSHIPS.**—The Law of Receiverships as established and Applied in the United States, Great Britain and her Colonies, with Procedure and Forms. By JOHN W. SMITH, Esq., of the Chicago Bar. Lawyers' Co-operative Publishing Company, Rochester, New York. 1897.

This is the latest work on a very important subject. It has already acquired considerable favor with the profession and seems destined to hold its field. We have used it in several instances with advantage. If we were to attempt to draw it into comparison with other works on the same subject, we should say that, while it is possibly not written in a style equal to that of the work of Mr. High, it collates and cites a great many more cases than any other work on the subject, which is a very important consideration to a judge or practicing lawyer. Its value is enhanced by a collection of legal forms, and it has a thorough index. It is well printed.

**KERR'S SUPPLEMENT TO WILTSIE ON MORTGAGE FORECLOSURES.**—A Treatise on the Law and Practice of Foreclosing Mortgages on Real Property and of Remedies Collateral thereto, with Forms. By CHARLES HASTINGS WILTSIE, of the Rochester Bar. With a supplement bringing the Work down to March, 1897, and Additional Chapters on Mortgage Redemptions, by JAMES M. KERR, of the New York Bar, Author of etc., etc. In two Volumes. Vol. II. Rochester, New York. Williamson Law Book Company. 1897.

This so-called "Supplement" we understand to be merely another volume upon the same subject as the first. The original work of Mr. Wiltzie related to mortgage foreclosures in the State of New York. This work relates to mortgage foreclosures under the American law generally. Those who are acquainted with the other works of Mr. Kerr, who is understood to be the exclusive author of this volume, as he was of its former edition, will expect in its pages thoroughly good professional work, and it is believed that they will not be disappointed. Mr. Kerr has long followed the practice of collecting and classifying, day by day as they appear, all the published decisions on subjects covered by his existing works. This makes his revision thorough.

**BALLARD'S ANNUAL OF THE LAW OF REAL PROPERTY, VOL. IV, 1895.**—The Annual of the Law of Real Property: Being a Complete Compendium of Real Estate Law. Embracing all Current Case Law. Carefully selected. Thoroughly annotated, and greatly epitomized. Comparative statutory constructions of the Laws of the several States; and exhaustive treatise upon the most important branches of the Law of Real Property. Edited by TILGHMAN E. BALLARD and EMERSON E. BALLARD, authors of, etc., etc. *Volume IV, 1895.* Crawfordsville, Indiana. The Ballard Publishing Company. 1897.

Former annuals of this series have been noticed in this publication. This annual, which consists of 962 large law pages, presents the case law of the year 1895 upon all branches of the law of real property, and we believe collects all the important American decisions upon this very extensive department of the



law. The authors say that they have not assumed to say that any case, however weak, is of no value, but that they have preserved them all, while at the same time taking pains to indicate the character and relative importance of each. The index at the close of this volume covers the entire series.

**HOCHHEIMER ON CRIMES AND CRIMINAL PROCEDURE.**—The Law of Crimes and Criminal Procedure. Including Forms and Precedents. By LEWIS HOCHHEIMER, of the Baltimore Bar. Baltimore: Harold B. Scrimger. 1897.

The text of this book contains 504 pages of good sized type, well leaded. Any one at all acquainted with the subject must know that the American Law of Crimes and Criminal Procedure can not be adequately or properly stated in so small a compass, no matter how great the effort to avoid commentary and verbiage. This work will not displace any of the standard treatises on Criminal Law and Procedure, though it may supply deficiencies in some of them.

**MCCLAIN ON CRIMINAL LAW.**—A Treatise on the Criminal Law as now Administered in the United States, by EMLIN MCCLAIN, A. M., LL.D., Chancellor of the Law Department of the State University of Iowa. In two Volumes. Chicago: Callaghan & Co. 1897.

This is an attempt to state, in the space of 1267 pages of the ordinary law size and type, the whole American law of crimes and criminal procedure. This can not be properly done in so small a compass. We advance this view with confidence and without reserve. We, at the same time, admit that this author has furnished in this compass a very great amount of information, without detail and in the most compressed way. The claim is put forward by his publishers that he cites 5,000 cases in excess of any other work on the criminal law. This may be, and doubtless is so. If it is so, this makes the present work of vastly more value over any other work on the same subject. The writer of this notice has used this work with reference to one subject in the criminal law on which he had occasion to make a brief. He tracked the cases cited by the author down, one after another, and came to this impression: that the author has possibly not succeeded any better than some of his predecessors, and not as well as some of them, in writing a book from which the law can be learned from the mere reading of his text; but that, in furnishing keys by which the diligent searcher may discover and unlock the store-houses of that law, he has surpassed all others. His work impresses us as deserving to be characterized as a highly condensed and very meritorious digest, dealing only with ultimate points and principles, and not going into much detail in the way of explanation. We like his system of treatment in one respect very much: Under the head of each particular crime he undertakes to give the law relating not only to that crime, but to the procedure with reference to it, including forms of indictments, pleas, etc. He also collects and states, in a very condensed manner, what the courts have held with reference to the necessary averments in indictments for each particular crime of which he treats. Prof. McClain is an able man. He is one of the best legal educators in this country. It may be supposed that, in his office of instructor or lecturer on the criminal law, he has wrought this work out from the original sources: the statutes and judicial decisions. We are glad to say that we see in it no evidence of shining by borrowed light which is seen in the works of one and possibly more of the

other law professors. This admirably arranged, highly condensed, and thoroughly wrought-out work will furnish a tempting bait to the expert thieves employed on certain legal encyclopaedias, partly written and partly stolen, which are going through the press.

**REPORT OF THE UNITED STATES COMMISSION ON BOUNDARY BETWEEN VENEZUELA AND BRITISH GUIANA, WITH ACCOMPANYING TREATISES AND DOCUMENTS, AND A VOLUME OF MAPS.** Washington, D. C. Government Printing Office. 1897.

Our readers will recall the purposes for which this very peculiar commission was organized. Great Britain undertook to bully the weak republic of Venezuela into surrendering a portion of the territory claimed by that republic, in which discoveries of gold had been made and which were being exploited by British subjects. In the enforcement of what is called the Monroe Doctrine, the President of the United States determined to interfere to the extent of preventing any unjust spoliation of the weak American republic. This attempt had not been made until after a long long correspondence on this subject between this country and Great Britain, in which some of the letters of Lord Salisbury, the British premier, assumed a tone of contemptuousness bordering on insult. Under the recommendation of the President of the United States made, in a special message to Congress, a commission was raised, not to arbitrate or decide anything between the contending parties, but merely to make an investigation and advise the President where the merits of the case lay. That investigation has now been made, and the commission has made its report, which contains no recommendation; for the reason that, while its deliberations were in progress, a tripartite treaty was made between Great Britain, the United States and Venezuela for the arbitration of the matter in dispute. The investigations and publications of the commission will be of great value to the arbitrators, and will greatly aid them in arriving at a just result.

The history of this arbitration, together with the portraits of the arbitrators and of the royal umpire, is given in our last number. The publications of the commission now before us, and which cannot be too highly praised, consist of four volumes, as follows: Volume I: The Report of the Commission, together with several Historical Reports by experts employed by the commission. Volume II: Documents from the Dutch Archives, prepared by Professor Burr, together with certain miscellaneous Documents furnished by the Venezuelan government. Volume III: Cartographical Reports. Volume IV: A magnificent atlas comprising seventy-six maps, reproducing many of the ancient maps which bear on the question of this disputed boundary.

It will be recalled that the members of this commission were Hon. David J. Brewer, an Associate Justice of the Supreme Court of the United States; R. H. Alvey, formerly Chief Justice of the Court of Appeals of Maryland, but now Chief Justice of the Supreme Court of the District of Columbia; Frederick R. Coudert, a distinguished lawyer of New York, who was one of the counsel for our government in the fur seal arbitration; Daniel C. Gilman, President of Johns Hopkins University; and Andrew D. White, lately President of Cornell University, but recently appointed our envoy to Russia. It will be noticed that a majority of this commission are lawyers, and that two of them are judges. It will also be noticed that in the commission appointed to arbitrate the question raised by the treaty between Great Britain and the United States with the con-

sent of Venezuela, the four arbitrators appointed are all of them judges, — one of them being the Chief Justice and the other an Associate Justice of the Supreme Court of the United States; the other two being among the highest judicial functionaries in England. The King of Sweden will doubtless appoint, if he has not done so already, a distinguished jurist of Sweden or Norway, to represent him as president of this Commission of Arbitration. The fact that great international questions are now remitted to the decision of judges, by conventions between great civilized states, is the greatest tribute which could be paid to the legal profession. It goes far toward justifying the theories of those who advocate what they call *judicial supremacy*, — the doctrine that the judges should control the other two departments of the government, determining what they can do and what they can not do; in other words, that the judges, under the guise of constitutional interpretation, should run the other two departments of the government. So long, however, as the judges, in the decision of political controversies, derive their jurisdiction from voluntary submissions to them by the political departments of the governments engaged in such controversies, no public dangers, but only public benefits, will accrue from submitting great public controversies to men whose minds are trained, through the work of doing justice according to law in private controversies, for the decision of questions of the greatest public moment.

AMERICAN STATE REPORTS, VOLUME 55. — American State Reports, Containing the Cases of General Value and Authority, Subsequent to those Contained in the "American Decisions," and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported and Annotated by A. C. FREEMAN and the Associated Editors of the "American Decisions." *Volume LV.* San Francisco: Bancroft-Whitney Company. 1897.

This volume, which closely resembles its recent predecessors, contains, in addition to short notes at the end of every case, valuable notes, collecting numerous authorities, upon the Liability of Apothecaries and Druggists;<sup>1</sup> the Validity of Sentences Differing from those Authorized by Law;<sup>2</sup> Validity of Stipulations in Promissory Notes for Attorneys Fees;<sup>3</sup> Ignorance of One's Rights as a Ground of Relief in Equity;<sup>4</sup> The Enforcement of Contracts outside of the Jurisdiction where made;<sup>5</sup> Suits by Undisclosed Principals upon Contracts made with their Agents;<sup>6</sup> and a number of other subjects. The short notes appended to each chapter carry the searcher back to cases and notes in the two previous series, the American Decisions and the American Reports. By this means one having the entire series can brief almost any question in the law, at least if he has in addition the reports of the Federal Courts.

<sup>1</sup> P. 255, *et seq.*

<sup>2</sup> P. 264, *et seq.*

<sup>3</sup> P. 438, *et seq.*

<sup>4</sup> P. 494, *et seq.*

<sup>5</sup> P. 774, *et seq.*

<sup>6</sup> P. 916, *et seq.*





**JUSTICE STEPHEN J. FIELD.**

# THE AMERICAN LAW REVIEW.

NOVEMBER-DECEMBER, 1897.

## ANDREW JACKSON AND HIS COLLISIONS WITH JUDGES AND LAWYERS.<sup>1</sup>

Andrew had retreated to their fleet. The British ships of war had ascended the Mississippi and engaged Ft. St. Philippe and had been driven off. The British admiral had received a report or rumor from Jamaica that a treaty had been signed at Ghent, and he communicated it to the British general. Jackson, in reply, inquired whether the British general regarded the report as sufficiently authentic to suspend hostilities, and Admiral Cochrane replied that he did not. Jackson determined to relax no vigilance, not to be deceived by a rumor of peace which might be used by the enemy to lull him into security, and to enable the enemy to work a surprise upon him. A newspaper called *the Gazette* published a statement that a flag of truce had been sent by the British admiral had communicated an official announcement of the conclusion of peace, and "virtually requested a suspension of hostilities." Jackson declined to publish a press statement contradicting it. He declared that it was yet uncertain whether articles of peace had been signed, and he referred to the fact that it was necessary that such a

<sup>1</sup> Concluding portion of an address delivered before the Tennessee Association at Nashville, July 29, 1897, by Seymour D. Thompson, of Missouri.

<sup>2</sup> Tennessee Association at Nashville,



STEPHEN J.

# THE AMERICAN LAW REVIEW.

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The British had retreated to their fleet. The British ships of war had ascended the Mississippi and engaged Ft. St. Philipe and had been driven off. The British admiral had received a report or rumor from Jamaica that a treaty of peace had been signed at Ghent, and he communicated it to the American general. Jackson, in reply, inquired whether the British admiral regarded the report as sufficiently authentic to warrant a suspension of hostilities, and Admiral Cochrane replied that he did not. Jackson determined to relax no vigilance, and not to be deceived by a rumor of peace which might be started by the enemy to lull him into security, and to enable them the better to work a surprise upon him. A newspaper called the *Louisiana Gazette* published a statement that a flag of truce from the British admiral had communicated an official announcement of the conclusion of peace, and "virtually requested a suspension of hostilities." Jackson hastened to publish a press-communication contradicting it. He declared that it was yet uncertain whether articles of peace had been signed, and he drew attention to the fact that it was necessary that such a

<sup>1</sup> The concluding portion of an address delivered before the Tennessee Bar Association at Nashville, July 29, 1897, by Seymour D. Thompson, of Missouri.



treaty should be ratified before it could take effect. He announced, in picturesque language, his determination not to relax his vigilance and permit the enemy to regain the advantages he had lost "and triumph over us in turn;" and he prohibited the newspapers from publishing any more such statements without ascertaining their truth and *obtaining permission from the proper sources*. This raised the cry of muzzling the press. It raised a shrieking protest from the "muzzled" editor; and some of the French militia under the command of Jackson seized upon the device of escaping the operation of the martial law which he was enforcing, by appealing to the French consul for protection on the ground of their being subjects of the king of France. It is said that in this way two companies contrived to desert and disband. Jackson met this new device by ordering all French citizens, who were not also citizens of the United States, to leave the city within three days, and not to return within 120 miles until news of the ratification of peace should be officially promulgated. This brought forth a long howl of protest in the shape of a letter published in the *Louisiana Courier* in the French language, signed by "A Citizen of Louisiana of French Descent." Jackson demanded the name of the writer and it was given. He proved to be one Louallier, a member of the legislature,—a body which had been so seditious that on one day Jackson had turned them out of their hall and locked them out. Jackson promptly ordered him to be arrested. He promptly sued out a writ of *habeas corpus* before Judge Dominick A. Hall, of the District Court of the United States. Jackson thereupon issued an order for the arrest of Dominick A. Hall, on the ground that he had been "aiding and abetting and exciting mutiny within my camp." Louallier was ordered to be tried by court-martial on a variety of charges, which would have been proper if he had been a soldier in Jackson's army. These charges, as stated by Mr. Parton, were: "Exciting to mutiny; general misconduct; being a spy; illegal and improper conduct; disobedience of orders; writing a willful and corrupt libel against the general; unsoldierly conduct; violation of a general order." The nature of these charges leads to the conclusion that Louallier must himself have been

enrolled in the militia under Jackson's command. This arrest took place on March 5th. The next day a messenger arrived from Washington bringing (as he thought) news of the signing of a treaty of peace; but when his packet was opened it was found, to the amazement of all, that it did not contain any official advice of the conclusion of peace, but only an unimportant document which it was subsequently discovered had been put in the package by mistake! Jackson communicated the exact facts to the British general, and resolved to maintain martial law until the news of peace should reach him in official form. A week elapsed and no more news of peace. Finally Jackson determined to dispose of his elephant (the Federal judge) by sending him outside his lines and setting him at liberty, there to remain "until the ratification of peace is regularly announced, or until the British shall have left the Southern coast." Jackson vouchsafed the judge an escort of no more dignity than a sergeant and a squad of enlisted men, and so banished him beyond his lines. The very next day after the execution of this extraordinary order, official news of the conclusion of peace arrived. Jackson immediately pardoned all military offenders, released Louallier, and allowed Judge Hall to return to his home.

It was now the judge's turn. He cited Jackson to appear before him and show cause why he should not be punished for contempt. Jackson appeared, and his representative (probably a staff officer) attempted to read a defense which had been drawn up by the master hand of Edward Livingstone. Briefly stated, this justified the general's conduct in declaring and enforcing martial law down to the time of the official notification of peace, on the ground of *necessity*. The judge interrupted the reading of it, made the rule absolute, ordered an attachment to issue, and made it returnable on March 31st. On that day the court room was crowded to suffocation, and when the stately form of Jackson appeared, the hall resounded with a roar of thousand-voiced applause.

"As when the hollow rocks retain  
The sound of blustering winds which all night long  
Had roused the sea," —

Such applause was heard when Jackson entered. The judge, alarmed for his personal safety, remarked that it was not possible nor even safe to transact business under such circumstances, and ordered the marshal to adjourn the court. Then Jackson rose to a great height. With a wave of his hand he silenced his partisans, and the court room became still. He then told the trembling judge to proceed with the execution of the duties of his office. "There is no danger here; there shall be none. The same arm that protected from pillage this city, against the invaders of the country, will shield and protect this court, or perish in the effort." The District Attorney then proceeded to read no less than nineteen interrogatories. These Jackson refused to answer, and rested his defense solely on the paper which his representative had attempted to read at the previous meeting of the court, and declined to offer any further defense. Then the quaking judge sentenced the savior of the city to pay a fine of \$1,000. The general was borne back to his quarters on the shoulders of the multitude. The ladies of New Orleans started a subscription to pay the fine; but Jackson refused to receive it, paid it out of his own funds, and advised them to use the money they had raised in succoring the widows and orphans made such by the war.

Now that the party passions which have clouded this subject have long since passed away, lawyers can, I think, agree in estimating the conduct of Jackson in this particular. He was clearly justifiable in declaring martial law. His position was analogous to that of a viceroy, or a pro-consul in Roman times. He was ten weeks from his official superiors. The exigency demanded that he seize to himself every power and every resource; and the result vindicated his wisdom and courage. It was simply a question whether the people of New Orleans should live for a short time under the martial law of Jackson, or under the martial law of Pakenham. Now, what is martial law? It is nothing more than the displacement of the ordinary processes of law by the will of the commanding general. But it is not, for that reason, a stranger to the common law. It rests upon a maxim of the common law expressed in the words, emblazoned on the coat of arms of Missouri, *Salus Populi*

*Suprema Lex.* More briefly stated, martial law is the will of the commanding general. It necessarily suspends the writ of *habeas corpus*, so far as arrests made by or under his orders are concerned. While the enemy is thundering at the gates of the city, there cannot be two co-ordinate governmental agencies within, the one giving and the other countermanding orders. Martial law necessarily suspends all judicial process, except in so far as the commanding general permits it to proceed. The mere issuing of a writ of *habeas corpus* to discharge a prisoner whom the commanding general has arrested, becomes, then, in a state of martial law, an act of insubordination by a member of the camp into which the declaration of that law has converted the city; for a complete declaration and enforcement of martial law turn everything within the lines of the military occupation into a camp, and make every citizen in some sense a soldier; and such in fact was the martial law which Jackson had declared. Jackson was justified in maintaining his vigilance until news of the ratification of the treaty of peace was officially received and communicated to the British general, and until hostilities should be thereupon actually suspended. It would have been criminal for him to suspend his vigilance in consequence of a mere rumor of the conclusion of peace. Nothing would have been easier than for the enemy to spread such a rumor, to produce thereby a relaxation of vigilance, and then to make a descent upon the city from some unexpected quarter. It was for the commanding general, and not for the French editor or the Federal judge, to say when martial law should be relaxed. At the same time we must admit that Jackson acted with unnecessary severity. It was a part of his nature to go to extremes. It would have been sufficient for him to decline to obey the writ of *habeas corpus*, and it would have been dignified in him to communicate his declination to the judge, together with his reasons therefor. That probably would have ended the incident. But, in estimating the conduct of Jackson in this particular, we must not leave out of view the paramount fact that Jackson's law, and not Judge Hall's law, still prevailed. Most lawyers will, however, conclude that the judge, after having been arrested and exiled by the general,

could have done nothing less than fine him for contempt. This may be so. But behind it all lies the consideration that if, as we must admit, Jackson was right in declaring and maintaining martial law, the judge had no right to issue the writ until the declaration was removed. It is now regarded as settled that the writ of *habeas corpus* can only be suspended by an act of Congress. The question was not settled then, and an act of Congress could not be procured in time to meet the exigency. At all events the merits of the Great General were so transcendent, as compared with those of the little judge, that whatever our judgments as lawyers may be, our sympathies fly to the side of the general. If I am wrong in thinking that Jackson was right (though admittedly extreme in his measures), I prefer to be wrong in that way. It may be a depravity in me; but if so, I prefer to be depraved. I prefer to think of Dominick A. Hall, as an inconsequential and meddlesome man, whose otherwise worthless name has been rescued from oblivion and rendered immortal by being connected with the name of Andrew Jackson.

“ ————— the link

Thou formest in his fortunes, bids us think  
Of thy poor malice, naming thee with scorn.”

Not long before this incident the country was treated to the remarkable spectacle of James Kent, not a Federal judge, but Chief Justice of the Supreme Court of New York, issuing an attachment for contempt, without a preliminary order to show cause, for disobeying his writ of *habeas corpus*, against Morgan Lewis, a Major-General of the armies of the United States commanding a military post in time of actual war.<sup>1</sup> If the pretensions of Judge Hall, or of Chief Justice Kent were true, a judge could take a sentinel from his post in time of war by a writ of *habeas corpus*. Nay, he could discharge a whole division from their enlistment by this means; and he could arrest the Commanding General at the head of his troops in time of actual battle.

<sup>1</sup> Matter of Stacy, 10 Johns. (N.Y.) 328.

We must all admit, I think, that Jackson's military justice was unduly severe. The execution of John

**12. Jackson's  
Military Justice.**

Woods, a private of the Tennessee militia, who had been but a month in the service, for an act of hasty insubordination in disobeying his commanding officer and in resisting arrest, would have been sufficiently punished by an imposition of extra duty, or a month in the guard house, or, at most, a term in prison. But he was shot. He was shot, however, in accordance with the sentence of a general court-martial, composed of militia officers from his own State; and the offense of Jackson, if any, was in confirming the sentence of the court and in not exercising clemency. But Jackson had struggled against mutinous uprisings among his volunteers and militia; he had learned, to his cost, the folly of relying upon mobs to do the work of soldiers; he was in the heart of the Indian country; an Indian war was flagrant, and the decisive battle was yet to be fought, and he determined to fight it with an army; and in order that he might have an army with which to fight it, he determined to make an example which would enable him to enforce discipline. But although the youthful mutineer was defiant to the last, it must be admitted that the example which Jackson made was cruelly severe.

On the day before that on which Jackson entered the Cathedral of New Orleans in state and ceremony, where the Te Deum was sung in gratitude for his great victory and the deliverance of the city, he signed an order for the execution of six militiamen, sentenced to death by a court-martial for participating in a mutiny at Fort Jackson, in the Indian country, on the 19th and 20th of the preceding September. The court-martial which tried them and found them guilty and sentenced them to death was composed of five officers of Tennessee militia. The offense of the mutineers consisted in attempting to start a movement to disband in a body and start for home on the 20th of September, on the day before which, according to their view, their terms of service expired. This view was based on the ground that their enlistment was for three months only; whereas the view of the commanding general and of the members of the court-martial was that their term was for six

months. Parton, never friendly to Jackson, devotes a chapter to this affair, and it is in the nature of an apology for the conduct of the mutineers. All that I can gather from it is that there was a fair doubt as to whether the mutineers had enlisted for three months or for six months, and that the evidence left a doubt as to the extent to which some of them had participated in the conspiracy. If the view of Jackson and the court-martial that the term of service of the mutineers was for six months was the correct view,— and, having reference to the necessity of military discipline, it must be said that it was a question for the commanding general and not for the soldiers to decide, — then the punishment of death was obviously not too severe. That is the punishment that our present articles of war, and, it may be assumed, the laws of war in every civilized country, mete out to soldiers who desert in the face of the enemy. Such a desertion is greatly aggravated when it takes the form of a desertion *en masse*, as the result of a previous conspiracy; nothing short of death can expiate an offense so fatal to the integrity of an army and to the security of the country. In the Revolutionary War Washington and Greene put to death deserters, even without trial; and we may recall the tears and doggerel poetry shed over a boy named Bird, who after having (it is said) fought gallantly at the battle of Lake Erie, where Commodore Perry won his celebrated victory, was shot in compliance with the sentence of a naval court-martial for desertion. Popular sympathy is always apt to confer upon such unhappy persons the crown of martyrdom. The proceedings of the court-martial under which these executions took place, were officially published in 1828, and they made a volume. If we had several weeks of spare time and a corresponding amount of patience, we might sit down and investigate this unhappy incident and come to a sedate conclusion as to its merits. But we must remember that Jackson, when he reviewed the sentence of the court-martial (if he ever did review it at length) was in the face of the enemy at New Orleans. If, under such circumstances, he assumed, without reading the evidence, that the court had reached the justice of the case, we ought not to blame him too severely. It may be concluded that there is in this affair absolutely no sound

historical ground for arraigning the conduct of General Jackson.

Jackson's next conspicuous act of military justice was in the execution of two Englishmen in 1818 at St. Marks, at the close of the Seminole war. Jackson was then Major-General of the armies of the United States. Florida still belonged to Spain, and was under the jurisdiction of the Captain-General of Cuba. The Spaniards had been secretly hostile to us during the war of 1812, and had even openly abetted the British, by allowing them to occupy Pensacola with a military garrison, and allowing them to incite the Indians resident in Florida to hostilities against us. It may be inferred that, after the close of that war, no friendly feeling existed on our part toward Spain. Incited by British and Spanish agents, the Seminole Indians resident in Florida took the war path in 1817, with the customary incidents of fire and massacre inflicted upon our frontier settlements. Jackson was ordered to take the field and suppress them. He was to raise a volunteer force in Tennessee by a requisition on the Governor, with which, added to a force of regular troops at his disposal, he was to do the work. The Governor was on a hunting expedition, and Jackson, disregarding red tape and official regularity, assembled by a direct proclamation two regiments of his old veterans, and combined these with the regulars and friendly Indians at his disposal. At the head of this body of troops, numbering about 5,000 men, he invaded the Spanish territory without leave or license, and carried his campaign into the very heart of the Indian country, routing the Indians in their strongholds and utterly scattering and suppressing them. This Indian war had opened with the customary atrocities. On November 30th, 1817, a boat, having on board forty soldiers, commanded by Lieut. Scott, seven women (wives of soldiers), and five children, was making its way up the Appalachicola river. On reaching a point near Fort Scott, this vessel was fired upon by a large body of Seminoles, then lying in ambush in the woods bordering the stream. Four men escaped alive, by diving and swimming to the opposite shore; one woman was taken captive and carried away; six women, thirty-seven men, including Scott, and five children, were



deliberately butchered; the brains of the children being dashed out against the boat's side. Similar butcheries, differing merely in degree, occurred a short time afterwards. Three British subjects had been unquestionably instrumental in starting this Indian war: Captain Woodbine, of the British army, whom Jackson had encountered in the war of 1812; Captain Ambrister, of the British army, then absent from his command on leave, who was an active and pernicious agent of Woodbine; and Arbuthnot, a Scotch merchant who was engaged in trading with the Seminoles in their country. Jackson failed to catch Woodbine; Ambrister was captured while actually leading the Indians in hostilities against the Americans; Arbuthnot was merely arrested without having made any attempt to escape, evidently not suspecting that he had done any wrong, or expecting any molestation from the American commander. They were tried by a court-martial composed of no less than fourteen regular and volunteer officers, of which Major-General Gaines, of the regular army, was president. Arbuthnot was found guilty of the charge of "exciting the Creek Indians to war against the United States," and was sentenced to be hanged. Ambrister was found guilty of the charge of "levying war against the United States by taking command of hostile Indians, and ordering a party of them to give battle to the army of the United States;" and the court sentenced him to be shot. But on the following day the court reconsidered his sentence, and sentenced him to fifty stripes and to imprisonment for one year. Jackson approved the findings and the original sentences in both cases, and disapproved the subsequent modification of the sentence in the case of Ambrister, and ordered the original sentences to be executed. Both sentences were carried into immediate execution. Ambrister was shot, and Arbuthnot was hung to a spar of his own trading vessel. There were grounds for leniency in the case of Arbuthnot, but none in the case of Ambrister. Arbuthnot was a well-meaning, meddlesome man, who traded and constantly mingled with the Creeks and Seminoles in Florida; who naturally sympathized with them in their grievances against the Americans and noisily espoused their cause; who continually reminded them that the cession of territory made to the United

States by the conquered Creeks was contrary to the rights of the dissenting Creeks and Seminoles, and was in violation of the rights secured to them by the treaty of Ghent. On the other hand, he constantly advised and cautioned them against resorting to war to redress their grievances. But everyone acquainted with the nature of the Indian knows that if one poisons the Indian's mind by reminding him of his grievances, he administers no adequate antidote when he cautions him against making war to redress those grievances. However upright the motives of Arbuthnot may have been, that he was in a substantial measure the cause of the outbreak of the Indian war and of the consequent atrocities, there can be little doubt. When the news of these executions crossed the ocean, all England shook from center to circumference, and it seemed that the ministry would either have to declare war or go out of power. But Lord Castlereagh, who was then Prime Minister, had no mind or stomach for another war with us. He knew that another American war would not be a war with Hull, nor with Wilkinson, nor with Winder, nor even with Scott; but that it would be war with Andrew Jackson; and the cicatrice was yet raw and red made by the sword of the great Tennessean at New Orleans. Besides, England was groaning under an unsufferable weight of taxation, the legacy of the wars with Napoleon and of the recent war with us. The ministry resorted to the device of referring the question to the crown lawyers, and they, doubtless acting in sympathy with the known wishes of the ministers, advised them that Jackson had not violated the principles of international law; that when a subject joins a belligerent and makes war upon a friendly nation, he forfeits his allegiance and the protection of his own sovereign; and further that British officers had, under like circumstances, acted upon the view that neutrals assisting a savage enemy forfeited their lives in case of capture.<sup>1</sup> Now, the English people are eminently a law-abiding people; and when they were officially informed that Jackson had acted legally, they

<sup>1</sup> See the correspondence as given in Wharton's Digest of International Law, §§ 190, 216, 243 and 348a. Dr. Wharton concludes that Jackson acted

legally, though he admits that the reasons put forward by Jackson in justification of his action were incorrectly expressed.

acquiesced, and there was an end to the incident. As they acquiesced upon legal advice, we must acquiesce, and justify the conduct of Jackson.

In the year 1821 Spain finally ceded the territory of Florida to the United States. Jackson, who had previously resigned his commission as Major-General in the army of the United States, was appointed Governor of the new territory, and was sent to Pensacola to receive from the Spanish officer in command there (Col. Callava) the formal "livery of seizin," together with the delivery of such public property and archives as passed to the United States under the terms of the treaty. Congress had not yet enacted any laws for the government of the newly acquired territory. It is familiar law that under such circumstances, the Spanish law continued in force until displaced by other laws enacted by the new sovereign. By the commission of Governor Jackson he was to have "all the powers and authorities rightfully exercised by the Governor and Captain-General and Intendant of Cuba, and by the Governors of East and West Florida," except the power of taxation. The Captain-General and Intendant of Cuba is understood to have held both the supreme executive and the supreme judicial power. If President Monroe had ordered that, until Congress should enact laws for the government of the newly acquired territory, the laws of Alabama, or, better yet, those of Tennessee, should be deemed to be in force, in so far as they could properly be made applicable, the incident about to be related would have assumed a different aspect. With absolute power vested in the Governor, and with only Spanish law in force, the President commissioned two judges, one for East Florida and one for West Florida. What powers, if any, were conferred upon these officials by their respective commissions, I have not been able to find out. The one appointed for West Florida was a Frenchman named Fromentin, who had been a Jesuit priest; who had deserted his order and his sacred calling; who had come to America, married in New Orleans, and who had been admitted to the bar there; but who had, in turn, deserted his wife, gone

back to France, and tried to be a Jesuit priest again, but the Jesuits would not have him; and he had thereupon returned to America, made up with his wife, and through the influence of her family, had procured his present appointment as judge in the Territory of Florida. What follows is dished up by Mr. Parton, in his pessimistic way, in twelve "scenes" of a farce-comedy. The ceremony of delivering the Territory to the American Governor had been performed, but the Spanish Governor, Col. Callava, still remained in his character of Spanish Commissioner to the Territory, completing the work of shipping to Cuba what property belonged to Spain. In this state of affairs a mulatto woman came into Jackson's office, and told him she was the daughter of one Vidal, a lately deceased Spanish officer, which was the fact; that she was about to be cheated out of her inheritance, which turned out to be a mistake; that the evidentiary documents upon which she relied to prove her right were in the hands of one Sousa, a subordinate Spanish officer, and that they were about to be sent away to Cuba. It is understood that, by the terms of the treaty, the United States was entitled to the possession of documents of that character. Jackson requested Sousa to deliver them to him. Sousa refused, on the ground that he held them, not on his own official responsibility, but for Colonel Callava. Jackson then demanded them of Callava, and was in turn refused. Jackson thereupon arrested both Sousa and Callava, and confined them in the common calaboose. He also arrested and confined one Vallarat, who had become mixed up in the affair. On the oral application of Colonel Callava, Judge Fromentin issued a writ of *habeas corpus* to the officer having him in charge in the calaboose. Obedience to this writ was refused, and the officer sent it to Jackson, who immediately, in his character of Captain-General and Intendant, which included the office of Supreme Judge and Chancellor, ordered Fromentin to appear before him and answer for contempt. In the meantime he had sent a file of soldiers to Callava's house and seized the documents. Fromentin came, and a stormy scene ensued. I do not understand that Jackson actually arrested Fromentin. When he appeared, in answer to the citation, the documents had been procured; the

prisoners were consequently released; official reports were sent to Washington both by Jackson and Fromentin, and an official complaint by Colonel Callava; and it subsequently transpired that the mulatto woman was mistaken in supposing that she was being cheated out of her inheritance. A comical tinge was given to this whole affair by the circumstance that Jackson did not understand Spanish, nor Callava English, and that there were none who could accurately translate between them; so that, in the stormy interview which took place between them, in which Jackson required Callava to answer interrogatories, the language of neither was accurately translated to the other. Doubtless, if we could have a correct transcript of the questions put by Jackson in English, and a correct translation of the answers returned by Callava in Spanish, it would be a mixture fit to move the laughter of the gods. Upon the merits of this affair, I think it must be concluded that Jackson was wrong in assuming that he had the right to ignore Callava's official character and to treat him as a private person, and wrong in the sense of his action being hasty, rash and undiplomatic: in every other respects he was right. I do not understand where Judge Fromentin got his power to issue the writ of *habeas corpus*; for the Spanish law was still in force, and this writ is a stranger to that law. So far as we can glean from the ordinary historic disclosures in our possession, he had no more jurisdiction to issue the writ than Billy Bowlegs, the Seminole Chief, had. But if he had power to issue the writ, it was still true that Jackson was, by virtue of his office, the supreme judge, and hence above Fromentin. The conduct of the latter was therefore very much what the conduct of a justice of the peace would be, if he were to assume to issue a writ of *habeas corpus* to enlarge a prisoner confined by the judgment or sentence of the Supreme Court. On the whole, it must be said of this incident that although Jackson — then a sick man — exhibited haste, rashness, bad temper and want of tact, — yet, as against Fromentin, he acted within his powers; and that, rather than suffer even a poor mulatto girl to lose her legal rights, the grand old man showed himself ready to arrest the late Governor of West Florida and to defy all Spain.

**14. President Jackson Comes into Collision with Chief Justice Marshall.** son where, pursuing with inflexible firmness his own views of his public duty under the constitution, he is brought into collision with the greatest character in our judicial annals, and with the greatest judicial tribunal

that has ever existed in the history of the world. During the presidency of John Marshall, while the government established by the constitution of 1789 was yet in the formative state, that tribunal assumed the office of settling its interpretation. In the leading case of *Marbury v. Madison*,<sup>1</sup> the court asserted the right to exercise two extraordinary powers, neither of which had been expressly granted by the constitution. The first was the power to refuse to enforce an act of Congress which the court should deem opposed to the constitution. The second was the power of the judicial department of the government to impose its interpretation of the constitution upon the executive department, and to make good that interpretation by compulsory process directed against the officers of the executive department, even against the officers of the President's Cabinet in a particular wherein they wielded the power of the President himself. This construction of the constitution was resisted by Mr. Jefferson, but in vain. "My construction of the constitution," said he, in a letter to Judge Roane in 1819, "— is that each department is thoroughly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially where it is to act ultimately and without appeal." Then he gave examples of his position, among which was that he himself had pardoned persons convicted under the Sedition law on the ground that the law was "unauthorized by the constitution, and therefore null." "These," added he, "are examples of my position that each of the three departments is equally to decide for itself what is its duty under the constitution, without any regard for what the others have decided for themselves under a similar question."<sup>2</sup> Jackson entertained and acted upon the same opinions. In his

<sup>1</sup> 1 Cranch (U. S.) 137.

<sup>2</sup> Jefferson's Letters (Randolph's ed.), Vol. 4, pp. 317, 318.

celebrated message vetoing the bill to recharter the Bank of the United States, he referred to the opinion of the Supreme Court upholding the original charter as valid, in the following language: "If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this government. The Congress, the Executive, and the court, must each for itself be guided by its own opinion of the constitution. Each public officer, who takes an oath to support the constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the supreme judges, when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive, when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve." Such also was the opinion of Mr. Lincoln.

Jackson was now to enforce this doctrine in a manner which shows most impressively how helpless the courts are to enforce their judgments when those judgments are opposed to the will of the executive branch of the government, and when that will is supported by the will of Congress and the will of the people; and how futile legal judgments are when they undertake to decide political questions, contrary to the views of the political departments of the government. The State of Georgia, one of the original thirteen States, voluntarily entered the Federal Union having within her boundaries a tribe of Indians known as the Cherokees, and the Federal constitution contained no provision depriving her of jurisdiction over the soil occupied by that tribe, to which soil the people of Georgia understood to belong to the State of Georgia in fee simple. By a succession of treaties, beginning with the Treaty of Hopewell, in 1785, the United States undertook to guarantee to these Indians their ancestral

domains, together with certain rights of a political nature which need not be enumerated, but in the exercise of which they had undertaken to form for themselves an independent constitutional government within the State of Georgia. Congress had subsequently engaged with the State of Georgia to extinguish the Indian title,—an engagement which, for a period of twenty-five years, and down to the events now about to be considered, it had failed to keep. In this state of things the legislature of the State of Georgia, intending to enforce the migration of the Cherokees from the State, passed a series of acts extending the jurisdiction of the State over the country of these Indians, which acts were of a character so severe and oppressive on their face that I do not undertake to justify them. The Indians undertook to assert their rights under the various treaties, and also under certain acts of Congress, as against the State of Georgia. They got no comfort from the President, who had fought two Indian wars, who had made two Indian treaties, and who was thoroughly acquainted with the nature of the Indian. This was a question upon which Jackson's mind was thoroughly made up, and in accordance with the views and wishes of the people of Georgia. When the Indians applied to him, he merely told them that "the President of the United States has no power to protect you against the laws of Georgia." Finding that the President's opinion had the support of Congress, and that they could therefore expect no aid from either of the political departments of the government of the United States, the Indians determined to apply to the judicial branch of that government in the hope that they could induce it to overrule the political branch. To assist them in this effort they retained two great lawyers, John Sargent and William Wirt. The results of these efforts are exhibited in three reported cases, one of them in the early Georgia reports, and the other two in the reports of the Supreme Court of the United States.

The first case was that in which a Cherokee Indian named George Tassel, commonly called Corn Tassel, was prosecuted and convicted in the Superior Court of Georgia, for murdering another Cherokee in that part of the Cherokee country within the State of Georgia, which the legislature of that State had



annexed to the body of Hall County. There was a plea to the jurisdiction, based upon the ground that the act of the legislature of Georgia, which undertook so to extend the jurisdiction of the State over the Indians, was unconstitutional, and contrary to the treaty of Hopewell, and to subsequent treaties. This plea was overruled by the judges of the Superior Court in convention.<sup>1</sup> To reverse this decision it was attempted to prosecute a writ of error in the Supreme Court of the United States. A fiat for the writ was granted by Chief Justice Marshall. The writ was issued and duly served upon the judge of the Superior Court of Georgia who had tried the case, he being the highest judicial functionary to whom the writ could run, the convention of judges being merely a voluntary meeting of the judges without statutory authorization. The Governor of Georgia deemed the matter of so much importance that he communicated it, by a special message, to the General Assembly then in session. The latter, by a joint resolution, denied and repudiated the jurisdiction of the Supreme Court of the United States over the question, and directed the sentence to be executed. Tassel was accordingly hanged, and no return was ever made to the writ of error.

The second case was nothing less than a suit in equity brought by the Cherokee Nation against the State of Georgia in the Supreme Court of the United States, to enjoin that State, its officers and agents, from enforcing its hostile legislation against the Cherokees. After great consideration, the court dismissed the bill, on the ground that, although the Cherokees were a "State," yet they were not a "foreign State" within the meaning of that clause of the constitution of the United States conferring jurisdiction upon the Supreme Court in cases of controversies between foreign States and the United States.<sup>2</sup>

The third case was that wherein a missionary, sent to the Cherokees by the Board of Foreign Missions, refused to take out the license required by the statutes of Georgia to be procured from the Governor of Georgia before entering the Cherokee country. For this he was prosecuted in the Superior Court of Georgia under a severe penal statute, was convicted, was sentenced to

<sup>1</sup> *State v. Tassels*, Dudley (Ga.) 229.

<sup>2</sup> *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1.

hard labor in the penitentiary for a period of four years, refused to accept pardon on the condition of taking out the statutory license, but prosecuted a writ of error in the Supreme Court of the United States, the Board of Foreign Missions retaining Sargent and Wirt as counsel. The court unanimously reversed the judgment of the Superior Court of Georgia, on the ground that it had been pronounced under color of a law which was void, as being repugnant to the constitution, treaties and laws of the United States. The mandate of the Supreme Court of the United States then went down to the Superior Court of Georgia, but it was disobeyed. The Governor of Georgia is reported to have said that he would rather hang the prisoner than liberate him under the mandate of the Supreme Court; and President Jackson is reported to have said: "John Marshall has made his decision, now let him execute it." The missionary, notwithstanding this mandate, was kept in prison about eighteen months, and was finally liberated, apparently because the authorities of Georgia were ashamed of themselves, or got tired of keeping him.

Now, facing an audience of lawyers, subject to be reversed by them, as every lawyer is subject to be reversed, and admitting that I have been reversed on this question, and by the greatest judicial tribunal in the world, and disclaiming any purpose of expressing an opinion on the political aspects or merits of this case,— I am nevertheless here to defend Andrew Jackson against the imputation of usurpation, or of acting beyond the limits of his just constitutional powers. I am not here to defend the legislation of Georgia as being humane, wise, or just; though I ask for it that lenient consideration which springs out of what we know of the nature of the Indian, and the difficulty which a body of white people must experience in living in immediate proximity with him. What I do say is this: This question was exclusively a political question, and when the State of Georgia and the political departments of the government of the United States united in deciding it one way, however unjust that decision may have been, the judicial department of the government of the United States had no power to decide it the other way. The question whether a treaty between the United States and another nation capable of making a treaty, shall be enforced or be abro-

gated, or suffered to lapse and become a dead letter, is a question which, from its very nature, cannot be decided by the judicial department of the government of either of the high contracting parties as against the political department of that government. Whether a treaty shall remain in force or be abrogated is a question of which the judiciary can have no cognisance, but it is a question the decision of which must be left to one or both of the parties to the treaty, acting through the treaty-making department of their respective governments. And if one of these parties, so acting, unjustly abrogates a treaty, or refuses to carry it out, it does not become answerable therefor to its own judiciary, but only to the other party to the treaty, the penalty being such force, in the exercise of war, as the other party shall see fit to apply. Let me illustrate this by one or two supposed cases. Suppose that, after the ratification of the treaty for the annexation of Hawaii to the United States, and after Congress shall have enacted a code of laws for the government of the territory so annexed, a subject of the Emperor of Japan, domiciled in Hawaii, should be convicted of a crime and sentenced to undergo a punishment in accordance with those laws, and he should sue out a writ of error in the Supreme Court of the United States, on the ground that the treaty of annexation was inoperative and that the law of Congress under which he had been convicted was contrary to some old treaty between Japan and the kingdom of Hawaii, or between Japan and the United States,—what would be thought of a decision affirming such a view? Or to go further; for distant illustrations are often most forcible, because we see the outlines of distant things more clearly. At the conclusion of the Crimean War, Russia, England, France, Turkey, and perhaps other signatory powers, entered into a treaty, whereby (among other things) Russia engaged not to keep a fleet in the Black Sea composed of more than a stated number of vessels. Not long ago Russia got tired of this restraint, and notified the other signatory powers of her intention to disregard that clause of the treaty. Suppose that the Queen of England, or the Sultan of Turkey had thereupon filed a bill in equity in the highest judicial court of the Russian Empire to enjoin the Czar, or the Minister of Foreign Affairs, or the other prin-

oipal political agency from disregarding that clause of the treaty and launching in the Black Sea a greater number of ships of war than Russia had thereby engaged to keep in that water,— what would be thought of such a proceeding? And yet it does not seem that such a proceeding would be essentially different from the judicial proceedings by which the Cherokees endeavored to persuade the judicial department of the government of the other treaty-making power to enforce the treaty against the will of its political departments. Let us take another illustration. We all recall that our war with Mexico was fought over the question whether the western boundary of the State of Texas was the river Nueces, as Mexico claimed, or the Rio Grande, as Texas and the United States claimed. Suppose, after the State of Texas had established judicial courts in the disputed territory, a person there found had been tried and convicted in one of those courts, and sentenced to undergo punishment for an offense there committed; and suppose he had sued out a writ of error to reverse that conviction, in the Supreme Court of the United States, on the ground that, although the political departments of both the State of Texas and the United States maintained that the disputed territory belonged to the State of Texas, yet such was not the fact; and suppose the Supreme Court of the United States had held that the Texas court had no jurisdiction because the territory within which the alleged crime had been committed did not belong to Texas, but to Mexico,— what would have been thought of the decision? If private rights arise under treaties with foreign nations, the judicial departments of our governments, both Federal and State, must undoubtedly give effect to those rights, because the constitution of the United States makes treaties made in pursuance of it “the supreme law of the land;”<sup>1</sup> but if the power that can make a treaty with a foreign State sees fit to break it, or to allow it to lapse and declines to maintain it, or carry out its provisions, the judiciary cannot restore it; otherwise the judiciary might as well enter upon the work of making treaties in the first instance. It was therefore for the President and the Congress to say whether treaties with the

<sup>1</sup> Const. U. S., Art. VI.

Cherokee Indians residing within the limits of the State of Georgia should be continued in force, or be supplanted by the legislation of Georgia; and so long as both President and Congress concurred in taking the latter resolution, the Supreme Court had nothing to do with the question. Its decision that the treaties and acts of Congress overrode the legislation of the State of Georgia was undoubtedly sound; but it was for the President and Congress to say whether the treaties or the adverse legislation of Georgia should prevail,—being answerable for an erroneous decision to no power save the other contracting party—in this case the Cherokee Nation. We must therefore conclude that Jackson, in this instance also, acted within his constitutional powers, whatever may have been the merits of his action.

No tribute to Andrew Jackson would be complete without

**15. A Tribute to  
Rachel Donelson  
Jackson.**

some allusion to the noble and pious woman who, for a third of a century, presided over his hospitable home and formed the partner of his toils and triumphs. The circumstances attending her marriage with him were clouded by a grievous mistake of fact, were misunderstood, and misrepresented. The highest tribute that can be paid to her is found in the fact that her husband, for forty-seven years stood ready to stake his life in vindication of her honor and of the honor of her memory, and, it is said, kept a pair of pistols forever loaded, to be used upon any man who might dare to asperse "that sacred name." Their domestic lives were sweet and beautiful. Although Jackson was of a sudden and rash temper, yet no tradition of domestic broil has come down to us. Towards his enemies in public and private life, he carried a lofty and sour temper; but in the bosom of his family, among his domestic slaves, and among his immediate friends, he was as sweet as summer. His relations with women were pure, and therefore his opinions of women were exalted, and his treatment of them chivalric. If, in his early life, he was rough and even profane, his wife was always a model of deep and active piety. All her letters to her friends and relatives, when absent from the hermitage with her distinguished husband, of which a

great many are extant, are full of religious exhortations. She seems to have been continually oppressed with the honors and ceremonials which were lavished upon him, and feared that earthly honors would keep his thoughts forever weaned from heavenly things. His greatest triumph was his first election to the Presidency; her greatest triumph was when he promised her to embrace and publicly profess the Christian religion, of which he had always been an unquestioning believer. She did not live to realize that promise; but she did live to congratulate him upon his triumph. Immediately after that triumph she died suddenly of a heart disease which had long afflicted her. Instead of becoming mistress of the presidential mansion, she was translated to mansions on high. As ever in their lives, so, after she was gone, he kept his sacred word and faith with her. After he had sounded all the depths and shoals of earthly honors, he returned to the Hermitage to spend the short span of life which still remained to him; and there, over her green grave, he became a penitent Christian.

More than once in the tide of history, when great leaders have died, their followers have refused to believe that they were dead. After the great

**16. The Apotheosis of Jackson.**

Constantine had passed away, his body was seated upon a throne and there received adoration. When Mahomet died, his followers exclaimed, "By God, he is not dead; the Prophet of God cannot die!" Many of the colored people still believe that Lincoln did not die, but was translated to heaven like Elijah. Corresponding to this we have the worn-out joke, which had a semblance of truth, of how the followers of Jackson continued to vote for him at every presidential election after his death, until the outbreak of the Civil War. In fact, his death produced a public sensation scarcely less than that which was produced by the death of Washington. And the name of Jackson remains the watchword of a great, patriotic and powerful political party. It is, indeed, a name to conjure with; and the Jacksonian legend has in it a spell that touches the patriotic heart and makes the wisest head its sport. Not that all his opinions upon the public questions of our day were those of his present followers. For example, his fol-

lowers generally favor a tariff for revenue only: he favored a protective tariff to diversify our industries and divert 600,000 agricultural laborers, unprofitably employed, into the channels of mining, manufacturing and the mechanical arts; thereby creating home markets for our surplus agricultural products.<sup>1</sup> But from the fact that in his time he was in favor of a protective tariff to build up and diversify our infant industries, it does not necessarily follow that, if he were among us to-day, he would favor a tariff which would tax and grind the agricultural and producing people in order to foster gigantic trusts, monopolies and industrial combinations. That he would stand for the people against the monopolies, no one, after reading his famous message vetoing the bill to recharter the Bank of the United States, can for one moment doubt. In these days when gigantic trusts are seeking special privileges at the hands of Congress, a reading of that celebrated document is hygienic. So, unlike most of his followers to-day, Jackson was, *par excellence*, the apostle of gold money. His name stood for gold; and in his view, gold and silver ought to be coined and circulated only at a commercial ratio. But human thought undergoes development, and human opinion undergoes substantial changes, under changing conditions; and we cannot feel absolutely certain as to what the opinions of Jackson, even upon financial questions, would be, if he were among us to-day. His fame rests largely upon his prompt assertion of the supremacy of the laws of the Union against the Nullification ordinance of South Carolina, and upon his famous declaration, given in the form of a toast at a public banquet, "The Federal Union, it must be preserved." But, if he had lived through what Mr. Lowell called "the inevitable wrong,"—I mean the wrong and strife over the question of slavery, and had seen the two great sections of the Union separate from each other and form into hostile camps, it cannot even be affirmed that he would not have joined the Secession movement in 1861; though it is probable he would have adhered to the Union, as his life-long friend Gen. Sam Houston did. But, beyond question, there were many men as patriotic as Jack-

<sup>1</sup> See his letter to Dr. Colman, of Virginia, in Parton's *Life of Jackson*, Vol. III., page 34.

son or Houston who took a different view of their public duty in that crisis; and whatever view Jackson may have taken, he would have led, not followed.

As between the rich and the poor, Jackson sided with the poor; as between the oppressor and the oppressed, he sided with the oppressed. His patriotism was intense, and if he ever exercised power harshly or arbitrarily it was never done for himself, but always for his country. Herein lay the great contrast between Jackson and Napoleon. Both acted arbitrarily. But Jackson was intensely patriotic; whereas Napoleon had no patriotism: he depopulated France, and made her citizens three inches shorter, in order to promote his own aggrandizement and that of his family. Jackson was absolutely honest, and never acted in important matters except from firm conviction and settled principle; Napoleon had not a particle of honesty in his whole make-up — it is doubtful whether he ever had one fairly honest thought in his whole life. While possessed of a noble ambition, a quality not discreditable in any man, Jackson's public aims were unselfish and patriotic. From the time when he first entered public life, all his energies were strained to promote the honor of his country and the welfare of his countrymen. How little there was in him of self-seeking is shown by the fact that, in the upward course of his career, he resigned no less than six high offices, in every instance with the hope of retiring to private life. Those offices were: Representative in Congress; Senator in Congress; Judge of the Superior Court; Major-General in regular army of the United States; Governor of the territory of Florida; and (a second time), Senator in Congress. In view of these repeated instances of self-abnegation, we may well apply to him the tribute which was applied to the Father of his Country,—

“Proud to be useful, scorning to be more!”

In eastern France, on the line of the Lyons and Mediterranean Railway, a traveler sees from the railway carriage as he passes along, two or three miles to the south of him on a hill, a colossal statue standing with clean outlines against the pure blue sky.



It is the statue of Vercingetorix, the Gallic chieftain, standing on the site of the ancient capital of his country. After 2,000 years have piled their oblivious sands above his memory, the patriotism of France has erected a monument which touches the clouds, to commemorate the deeds of a patriot who fought and died to save his people from the yoke of Rome. The imagination of every American patriot raises a similar monument to the memory of Andrew Jackson. There he stands upon the horizon of the distant past, his clear and rugged outlines in bold relief against the sky; not dimmed by the lapse of time, nor by the intervening clouds and flashes of the Civil War; not shrunken in the long perspective of history, but still of colossal size. He is not dead, but still living and of potent energy: still leading, still conquering, still marching on. If he could appear in our midst to-day, and see in this city the gathered evidences, which we see, of progress in the arts, the sciences and the utilities which minister to human enjoyment, he would say: "Verily I am a citizen of no mean city." And we would rise and respond with one acclaim: "Honor and gratitude to him that filled the measure of his country's glory."

## LAND TRANSFER BY REGISTRATION OF TITLE IN GERMANY AND AUSTRIA-HUNGARY.<sup>1</sup>

I have the honor to report that in the month of May last, in pursuance of your instructions, and with the authority of the Treasury, after communication with the Lord Chancellor, I made an investigation into the working of the system of Land Transfer by registration of title in Germany and Austria-Hungary, which are the only large European States in which that system is at present in force.

My instructions were to inquire not only into the legal but also into the financial and administrative branches of the subject, the fees and expenses, the staff, buildings, precautions against fire and other accidents, the connections with the Cadastral surveys, the relations of the central and local branches, protection against fraud and error, compensations for errors, the facilities afforded for landowners and business men in transactions relating to land, and generally into all points on which useful information appeared to be obtainable. In conducting these inquiries I was authorized to visit not only the central offices in the capitals, but the local offices in provincial towns and agricultural districts as well.

Full particulars with regard to these subjects will be found under appropriate headings in the accompanying detailed report, but before proceeding to details it may be useful to make a short preliminary statement of the method and results of the inquiry from a general point of view.

The method pursued in the inquiry was this. The Foreign Office having obtained the assistance of Her Majesty's representatives abroad, who procured for me the highest official and other facilities in the countries visited, I first made general in-

<sup>1</sup> Report of C. Fortescue Brickdale, Esq., the Assistant Registrar of the Land Registry (England), on the Sys-

tems of Registration of Title now in operation in Germany and Austria-Hungary.—EDS. AM. LAW REV.

quiries in the respective capitals, Berlin and Vienna, consisting mainly of interviews with the chief officers of the Ministries of Justice and Finance, as to the principal features of the land registration law and of its administration, and as to the Cadastral system, maps and offices. I also had interviews with lawyers, bankers, and other business men as to the general practical results of the system as applied to every-day transactions, and inspected the registry offices, registers, maps and records for the central and suburban portions of the two cities. This done, I visited the registry offices and made further inquiries in Dresden, Prague, Budapest, Munich, and Cologne, together with other smaller towns in agricultural, industrial, and mining districts lying between those places, having been previously advised in the capitals as to where special features could best be studied.

By these means, as will appear from a perusal of the detailed report, I obtained a general survey of the actual daily working of the system of registration of title under a considerable variety of conditions. It was shown in its application to estates of various sizes, values, characters, and situations, and subject to numerous diverse legal, commercial, and political incidents.

In some of the districts observed, titles had been registered from time immemorial; in others they had been partially registered for a long period; while in others the system is totally new and unaccustomed, and has been preceded by no registration at all. The particular examples collected in the detailed report included (for instance) such great estates as the ancestral domains of the Bohemian nobility (among whom are to be found some of the largest landowners in Europe), subject to the strictest entails, carrying political privileges of the highest importance, and specially registered in immense separate volumes in the provincial capital; they also include (by way of contrast) the tiny subdivisions of the peasant proprietors of the Rhine Provinces, where the principles and practices of the Code Napoleon are still deeply rooted in the customs and feelings of the people. They include, on the one hand, specimens taken from the rapidly developing building properties in the suburbs of Berlin, with their villa residences and restrictive covenants, and, on the other, remote Silesian manors with their tenant

farmers, antique rights of common, and commuted rents and services, dating from feudal times. They show the system as applied to vast featureless plains like the corn-growing regions of Hungary, to the busy mining and industrial districts of Saxony and the Black Country of Germany close to the Russian frontier, as well as to the picturesque Alpine hamlets and pastures — with their innumerable interdependent rights of way, water, and other complicated easements — to be found in Styria and the Salzkammergut; they pass from the intricacies of cellars and flats, courts and passages, of the Jews' quarter of the city of Prague, to the simple conditions of a quiet agricultural district in Brandenburg; from mortgages on first-class properties, involving hundreds of thousands of pounds, and subject to the most complicated subsequent dealings by way of transfer, alteration, subdivision, and collateral security, down to rows of petty charges on diminutive shares in an inconsiderable estate; from great cities where values are measured almost by the square inch, to trackless wastes and bare mountains of scarcely any value at all.

Over the whole of this vast and diversified tract — embracing an area more than seven times the size of England and Wales — systems of registration of title differing in no essential particular from the systems established under the Torrens Acts in Australia, and partially established under the Land Registry Acts in England and Ireland, have been in almost universal operation for a considerable period, amounting in the principal Austrian provinces to upwards of eighty years, and in certain places dating from a much more remote period. The type of registration followed bears throughout a remarkable similarity to that of Lord Westbury's Act of 1862, every kind of interest in land being capable of registration, resulting, not unfrequently, in the formation of a somewhat involved and complicated record. It will be remembered by those familiar with the subject, that Lord Cairns' Land Transfer Act of 1875, by excluding certain minor interests from the register, provided a remedy for what was deemed a defect in the 1862 act in regard to this.

Notwithstanding this liability to become complicated — of which instances are given in the detailed report — the Conti-

mental registers appeared, according to every test by which their practical efficiency could be tried, to be giving complete satisfaction, and to enable landowners, large and small, habitually to transact sales and mortgages with an ease, rapidity, cheapness and security which, to persons accustomed only to the conditions of land transactions in this country, will appear almost incredible.

To begin with the question of cost. The following are a few specimens of the fees charged on sales and mortgages in the Prussian land registry — where the fees have lately been readjusted in consequence of a careful inquiry into their sufficiency to defray all the expenses, direct and indirect, of the administration, and in the Saxon registry, where they are also intended to defray all costs of the department.

Value.	Land Registry Fees.			
	On Sales.		On Mortgages.	
	In Prussia.	In Saxony.	In Prussia.	In Saxony.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
1.....	0 0 5	0 5 0	0 0 3	0 1 0
10.....	0 1 6	0 5 0	0 1 0	0 1 0
20.....	0 2 7	0 5 0	0 1 11	0 1 0
50.....	0 4 9	0 5 0	0 3 5	0 2 0
100.....	0 7 3	0 10 0	0 4 7	0 4 0
500.....	0 18 0	2 5 0	0 12 0	0 17 6
1,000.....	1 10 0	3 15 0	1 1 0	1 12 6
2,000.....	2 12 0	6 5 0	1 18 0	2 12 6
5,000.....	4 5 0	12 10 0	3 15 0	4 7 6
10,000.....	7 10 0	17 10 0	6 15 0	6 17 6
20,000.....	13 10 0	27 10 0	12 15 0	11 17 6
100,000.....	61 10 0	107 10 0	60 15 0	51 17 6

In Austria and Hungary the registry fees are also very low, and are stated in the detailed report, but they are not calculated with reference to the cost of the department.

The cost of professional assistance (where required) is, owing to the simplicity of the system, very slight. In Prussia, there is an *ad valorem* scale, which, in cases where the whole conduct of the transaction is committed to a professional man, is the same as the above (Prussian) Land Registry fee scale — with a minimum of 1s. 6d. Where the lawyer is only employed

for part of the work, half the scale fee is charged, with certain extras for time and distance.

In Austria and Hungary there is no fixed tariff of professional charges, but I was told by lawyers in good practice in both countries that their charges are not at all serious. In Vienna about £1 is a very usual fee for the purchaser's lawyer for investigating the register, drawing the deed, and attending to completion and registration. £10 is a high fee, even in large matters, and with wealthy clients. One of the judges spoke to me somewhat complainingly of a bill of 80 fl. (about £6 12s. 6d.) which he had been charged for professional help in a purchase of 50,000 fl. (about £4,176).

Of course these particulars as to cost must be taken subject to the reserve that the general scale of remuneration, both professional and official, in Germany, is considerably lower than it is in England; but it seems evident, from statistics given in the detailed report, that any allowance required on this account is more than counterbalanced, at least as regards official charges and costs, by the much higher *ad valorem* fee that would be earned in England per case — owing to the rarity of very small transactions (£50 and under), which are the staple work of Continental registries.

Turning next to the time occupied in sales and mortgages; the statements of the officials, corroborated by the evidence of land-owners and professional men, is everywhere the same. As a general rule, ten to fifteen days is the outside time occupied in transactions relating to land, from the first beginning of the negotiations down to final completion of the record in the land register, the effect of which recording — it is important to bear in mind — is to enable the purchaser or mortgagee, in his turn, at once to dispose of the property, or the security, with equal rapidity and ease, in the open market, and at no further expense or trouble to himself, as is also the case in the English Land Registry under the act of 1875. If expedition is required, a matter can be carried through in three days, and sometimes in one day, as the officials will always push forward cases where time is of importance. Mortgages to the Land Banks are completed in about three days. In fact, so rapid and free from

difficulty is the whole matter usually, that it is not the practice to place any interval between contract and conveyance; both are contained in the same deed. A certified copy of the register is the only title shown, and this can usually be perused in a few minutes; and even where the title is involved an hour will almost always suffice to test it. The representative of an English company, buying land some years ago in Pesth, could not believe that the whole matter could be concluded at a sitting; but it was, and notice of the completion of the registration was received by the purchasers the next day.

In Prussia, a *bona fide* purchaser or mortgagee from a registered owner becomes, immediately on registration, absolutely secure from all adverse claims. In Austria and Hungary there is, in theory, an interval varying from thirty to sixty days allowed for objection, with a very remote possibility of disturbance extending over three years. But these latter intervals are disregarded in practice, and are not known to have been ever utilized.

There always remains the theoretical possibility of a forged transfer, followed by the registration of the transferee, and then a sale by him to a *bona fide* purchaser ignorant of the fraud — in which circumstances the original registered owner would, if he did not discover the fraud and lodge an objection within the prescribed period, lose his land. But I was confidently assured, in answer to frequent inquiry, that no such case had ever arisen in practice. The parties to all dealings are identified by officials or notaries, and written notice of every application is sent to the registered address of every person affected by it, even when they have appeared personally and have consented to the entry being made. In Hungary no identification is required.

The simplicity of the system may be judged partly from the low scale of professional charges, which include all searches and communications with the registry, and from the fact that in the towns people commonly search the registers themselves, and often draw up their own deeds. If it is inconvenient to go to the registry to search, an official copy of the entries is obtainable for the perusal of the intending purchaser or mortgagee. Land certificates are not issued. The interests recorded in the

register books are occasionally complicated and involved; but owing to the mode of entering everything in its right place, and a very complete system of cross references, a comparatively short time enables a searcher to make an accurate note of the present state of any title and incumbrances, or to extract the title to any parcel or particular interest (such as a life interest, or an estate in remainder, with its incumbrances), or the title to any incumbrance, from among the other entries. This applies to the largest as well as to the smallest estates.

In Prussia all conveyances are now made verbally, by declaration of the parties in the presence of the land registrar (or in some parts before a notary public), who takes a note of the declaration made, and, on comparison with the register, the purchaser is entered as owner without more ado. This procedure results in the vast majority of country sales being concluded without any legal assistance whatever, at the mere cost of the registry fees. If desired, the attendance and declaration can be made by attorney.

It may be remarked in passing that these Prussian verbal conveyances have already a parallel in some of the late English land transfer bills, which proposed to give an option to purchasers on sales to apply for registration of themselves as owners of the land purchased without any conveyance: this registration, when completed, was to have the same effect as a conveyance by deed. This provision could easily be extended to transfers of land already on the register.

In Prussia, Saxony, Bavaria, Wurtemberg, and (it is believed) in most other German States, the registers are strictly private, and are only shown to persons having an interest in the land. In Austria and Hungary, and also in Baden, they are, and always have been, public.

In the examples cited in the detailed report, care has been taken to remove or alter any details likely to lead to the identification of particular estates in countries where the register is private.

Owing to the extreme ease with which, after a little practice, any ordinary business man can test a title, and draw up a mortgage, an immense business is carried on under the title of Real



**Credit Institutions and Land Banks.** The ordinary bankers, like our own, do not regard permanent mortgages of land as a very desirable form of investment, though, like our own bankers, they occasionally lend to their own customers on real security by way of favor. But the land banks (as to which fuller particulars are given in the detailed report) are specially formed for the purpose of lending money on security of land, and here landowners can obtain permanent loans, or, what is more common, loans to be paid off in forty or fifty years by terminable annuity, including principal and interest, to any amount, without delay, and usually without commission or any other expense than the bare land-registry fees. The largest landowners use these banks as well as the smallest, and are stated to have found them of the utmost service. The debentures of the land banks appear among the highest forms of securities in great numbers, in the daily published lists of the Stock Exchange.

It does not appear that the various results above stated are due to any special degree of simplicity either in the titles or in the transactions recorded. On the whole, from a perusal of a very large number of registers in all parts, it appeared that the subsisting interests in land in Germany and Austria are, as a general rule, at least as complicated as they are in England, and the entries in the registers especially in Austria (where all servitudes are registered), are certainly far more complicated than the entries in the registers kept under the Land Transfer Act 1875 are, or could ever become.

The main sources of complication in the German and Austrian registers are entails and settlements affecting the large estates; wills, family charges, life estates, and co-ownership, affecting every class of property, the last — co-ownership — being excessively common, owing to an arrangement often made on marriage, which gives a wife an immediate half-share in all her husband's acquired property; the law of intestate succession, which divides the property equally among all the children: and the usual practice of testators, to a similar effect. Under the English Land Transfer Act 1875, complicated beneficial interests are protected by cautions and other indirect means which do not complicate the register. The mortgages, too, in the Continental

registers, both for small and large sums, are numerous and often very involved, being secured on whole estates, parts of estates, and on the separate undivided shares, life interests, and other partial ownerships; with subsequent transfers, alterations, part payments, and other dealings, all of which are recorded on the register. Examples of these transactions will be seen in the detailed report.

Since the establishment of the Cadasters or Land Tax Registers in the various States the land registries have been worked in close relationship with them — almost the entire work of the description of estates being taken over by those departments; but that a Cadaster is not essential to a land register is clear from the fact that most of the registers existed for a long period before the Cadasters were made. In Austria, properties are now always described by reference to the Cadaster-numbers of their parcels; but in Prussia a general verbal description may sometimes be entered instead. When a parcel is cut up, a tracing, made or approved by the Cadaster officer, with a new number, also given by the Cadaster officer, is attached to the conveyance (or brought with it, if verbal) and left in the registry. In Austria, where the Cadastral maps are lithographed, copies are kept in the land registries and corrected up to date; but in Germany, where the maps are not lithographed, no copies are kept in the land registries. A full account of the relations of the Cadaster to the land registry will be found in the detailed report.

Mortgage certificates are issued in Prussia only. They are required to be produced on all registrations affecting the mortgagee's title, and are indorsed with notes of the transactions recorded. No other certificates of any kind (except certified copies of the registers) are issued.

It may be useful to add here a short description of the general official machinery by which the excellent results above stated are produced, and of the mode of introduction of the system (where known) into the principal States and Provinces; this in some cases is lost in the mists of antiquity, and in others is still in progress at the present day.

The system is essentially a local and district system, the

registers being everywhere kept in special rooms forming part of the offices of the local courts of first instance, which, wherever the state of the population admits of it, are (like our own county courts, of which there are 546 in England and Wales) within easy reach of every man's door. Except in Hungary, and a few very thinly peopled districts, no registry is more than about fifteen miles from the furthest hamlet it serves. In Baden and Wurtemberg the registers are still more localized, being established in every commune.

The registrars are members of the large body called *Richter* or *Amtsrichter* (of which there are 4,219 in Prussia, and 3,844 in Austria), who do the whole of the judicial or quasi-judicial work of the country. In small places, where there is only one *Richter* he combines the land registry with his other work; in large places in Germany there are one or more *Richter* exclusively employed in superintending the land registry work. In Berlin, for instance, there are thirteen, in Cologne six, in Dresden five, so employed. In Austria and Hungary it is otherwise, no *Richter* being exclusively employed in land registry work, but there are always one or more superior clerks who attend to nothing else.

This system appears to be both economical and convenient — securing the services of competent men, acquainted with the locality and knowing many of the landowners personally, at a minimum of cost; while the offices are so well distributed over the country that the poorest proprietors can, if they wish, inspect the registers and settle their business on market days, with no expense for traveling, and none of the difficulty and uncertainties of correspondence, abhorrent to the rustic mind. The large landowners, who of course do not always reside in the district where their lands are registered, conduct their business through the post or through a local legal or other agent.

The manner in which the system has been introduced into those parts of the country (and they were many) where no registers, or only incomplete registers formerly existed, is naturally of the highest interest and importance at the present juncture in England.

A great variety of circumstances antecedent to the present

system existed in different parts of the German and Austrian empires. In some places—Bohemia, for instance, generally, and many of the principal cities and numerous isolated manors and districts in the country—registers of ownership have existed from time immemorial. In Vienna, for instance, there are still preserved registers of 1368; in Prague, of 1377; in Munich, of 1440. In other places, such as the Rhine Provinces, Hanover, and some of the remoter Austrian provinces, *e. g.*, Bukowina and Dalmatia, ownership of land had never been registered at all, until the present system was introduced, not many years ago—though even here there was usually some kind of registration of mortgages. Between these extremes a great variety of mixed systems prevailed, and during the latter half of the present century there has been nearly everywhere the Cadaster, or Government land tax register, which though neither complete nor authoritative as to title, showed at any rate the person for the time being in ostensible possession of the land and accountable for land tax.

Registration of title was made universal for the then Austrian Empire in 1811; it was adopted in Saxony in 1843; in Hungary in 1849–56; and in Prussia (in its present form) in 1872. The system was in all cases gradually applied—province by province, district by district, commune by commune—under the general control of the Ministry of Justice and under the local control of the provincial Courts of Appeal. All inquiries were made at the Government expense, but this was not heavy. Although absolute titles were everywhere registered, very little documentary evidence of title was required, considerable reliance being placed on the local notices and advertisements, and information obtained from the land tax (Cadaster) books and local authorities. In Prussia, a very low scale of fees, amounting in small cases to a few shillings only, paid on first registrations, reimbursed the Government for all outlay.

Only in a few very remote and primitive districts have errors been at all noticeable, and then they appear to have been rather due to misapprehension of the motives and objects of the inquiry than to intentional fraud. In the Rhine Provinces, where registers are still in course of formation, where the subdivision of

the soil is so minute that there are as many landowners as in the whole of England and Wales, and where only registers of mortgage deeds formerly existed, no instance of intentional fraud has occurred in the returns sent in by the proprietors. Disputes are few, and chiefly relate to boundaries, which are, however, in nearly all cases amicably settled by a visit to the ground. Similar conditions a few years ago in Hanover, with the additional embarrassing element of a very prevalent system of verbal conveyances (which were duty free) have led to equally satisfactory results, no instances of erroneous registrations having occurred. This, indeed, has been the experience throughout Germany, but these two districts are specially cited here because, owing to the absence of preceding registers, they form a closer parallel to the case of England and Wales than other districts where a tolerably complete system of land registration was already in existence when the present registers were formed.

## CONSTITUTIONAL CONSTRUCTION AND THE COMMERCE CLAUSE.<sup>1</sup>

A private project for the establishment of a line of interstate transportation was the moving force that led to the adoption of the constitution. Washington, having surrendered his sword to the Continental Congress, turned his energies, as a private citizen, to the development by peaceful and industrial means, of the national spirit which, as leader of the army, it had been his opportunity to foster and maintain by force of arms. His comprehensive foresight had already peopled, in fancy, the unknown and illimitable Northwest. He realized that the only tie that could bind this future empire to the newly-born nation in the East was the bond of commercial intercourse. Navigation, the only adequate means of transportation at that time, furnished to this vast territory a natural and easy outlet, by the Mississippi and Ohio rivers, to the Gulf of Mexico, where, at New Orleans, the Spanish power offered protection and commercial opportunity to the interior. To divert the flow of commerce from this natural channel, and to insure thereby the peaceful and permanent alliance of the Northwest with the Federal power on the Atlantic Coast, Washington fathered and fostered a project for the building of a canal which should join the waters of the Ohio with those of Chesapeake Bay. The great obstacle in the way of this scheme, which thus united the hope of private profit with a project of Federal aggrandizement, lay in the sovereign power of each of the States which the canal must traverse, to regulate and to tax the canal and the commerce it was designed to carry. The diverse and harassing exercise of this power by the several colonies had produced that condition of commercial confusion which, more than anything else, had

<sup>1</sup> A paper read before the American Bar Association at Cleveland, Ohio, August 26, 1897, by Robert Mather, Esq., of the Chicago Bar.

condemned the Articles of Confederation as a plan of Federal union. It was to prevent the embarrassments which the exercise of this power might impose upon his projected instrument of commerce, that Maryland and Virginia, and afterwards Pennsylvania and Delaware, at Washington's suggestion, tried to agree on some uniform plan of commercial regulations. From this grew the Annapolis Convention to which all the colonies were invited to discuss plans for uniformity of legislation on commercial subjects. The universal conviction which these discussions produced that the power to regulate commerce among the colonies and with foreign nations should be withdrawn from the States and confided to the central government, led to the calling of the convention at Philadelphia.

The work of the Constitutional Convention was a growth which far exceeded the promises of its beginning; the suggestion for the adoption of a uniform code of commercial regulations grew into a national spirit which converted the tottering confederation into a united and puissant nation. The greatness of the work of that convention has long since overshadowed the cause that called it together; but the historic fact is never to be forgotten that the necessity of removing the subject of the transportation of persons and property from the power of State regulation was the immediate cause of the formation of the constitution. The object, the effort to attain which led to such great results, was believed to have been sufficiently accomplished by the insertion in the constitution of the simple provision that, "The Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

It might well be expected that a feature of our organic law which owned such lofty birth, would speedily and consistently have received a construction in harmony with the great purpose it was meant to accomplish. Yet no other provision of the constitution presents so interesting a view of the uncertainty of constitutional construction, and of the fleeting influence of principles of decision that seemed once to have been permanently established.

The struggle of the States has ever been to retain or regain

the powers surrendered to the central government in the commerce clause; and the conflict in the courts from the first engaged the partisans of State rights and the champions of Federal supremacy. The first battle-field was found in the famous case of *Gibbons v. Ogden*.<sup>1</sup> The genius of federalism fought for the theory that the commerce clause conferred upon Congress exclusive power over interstate and foreign commerce, and removed the entire subject beyond the range of the legislative power of the States. The spirit of State rights struggled for the doctrine that the Federal power was concurrent with a like power in the States, and that the States might still, despite this provision of the constitution, regulate commerce with foreign nations and among the States, until Congress should by positive act itself regulate the subject. The result of the engagement gave the victory to neither of the contending theories; for, while the masterly opinion of Marshall indicated his adherence to the theory of exclusive power, and the separate opinion of Mr. Justice Johnson insisted that judgment should be given on that ground, the determination of the great question was found unnecessary to the decision of the case. It was held that Congress had regulated the subject of transportation by water in the enactment of the coasting laws, and that the act of New York, granting to Livingston and Fulton the exclusive right of navigation by steam on the navigable waters of the State, was void because in conflict with these Federal laws. *Gibbons v. Ogden* decided nothing except that a State regulation of foreign or interstate commerce actually in conflict with a law of Congress, is void. This decision left the advocates of the doctrine of concurrent power free to insist that the State regulation was valid until it actually came in conflict with some law of Congress on the same subject. Thus, while the argument of the Chief Justice justified the claims of the advocates of exclusive Federal power, the ground of the decision gave comfort to their adversaries; and *Gibbons v. Ogden*, instead of settling the controversy, opened a veritable Pandora box of troublesome questions which tormented the bar and divided judicial opinion for many years.

<sup>1</sup> 9 Wheat. 1.



The struggle between the doctrines of exclusive and concurrent power was renewed in *Brown v. Maryland*.<sup>1</sup> The State regulation here in controversy was a law of Maryland requiring importers of foreign goods to take out a license for the sale of the imported articles. The State law was held invalid on two grounds: *First*, that it was in violation of that provision of the constitution providing that no State shall lay any impost or duty on imports or exports: *Second*, that it was repugnant to the commerce clause. The opinion of the Chief Justice on the latter proposition breathes again the national spirit that insisted on the exclusive view of the Federal power. That the history of the adoption of the commerce clause pointed to this as the true construction was emphasized in this language: "The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. \* \* \* Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

Doubtless this opinion was intended to establish, as indeed its reasoning does establish, the doctrine of the exclusiveness of the Federal power. But here, as in *Gibbons v. Ogden*, the decision of the case just failed of reaching the high ground of federalism at which the opinion aimed. There was here, as in the other case, a law of Congress with which the State law was

<sup>1</sup> 12 Wheat. 419.

plainly in conflict. The contention that the State might regulate the subject in the absence of such an act of Congress was still open, so far as authority went, to the advocates of the theory of concurrent power. That theory would, however, doubtless have been abandoned as condemned by the reasoning of the Chief Justice in the two pioneer cases, if it were not for the peculiar opinion, again by Marshall, in the case of *Wilson v. Black Bird Creek Marsh Company*.<sup>1</sup>

The State law which was there assailed as a regulation of commerce was an act authorizing the Marsh Company to construct and maintain a dam across Black Bird Creek, a navigable stream flowing into the Delaware river. The law was upheld on the express ground that Congress had not "passed any act which bore upon the case; any act in execution of the power to regulate commerce." "We do not think," said the Chief Justice, "that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce *in its dormant state*, or as being in conflict with any law passed on the subject."

If *Brown v. Maryland* had seemed for a time to put at rest the conflicting claims of the doctrine of exclusive power on the one hand and of concurrent power on the other, the unique decision in the Black Bird case at once revived the contention. It was claimed that Marshall had retreated from the lofty heights of nationalism which he had theretofore occupied during the strife on this question, and that his opinion in the Black Bird case was, if not a retraction, at least a modification or explanation of his views in *Gibbons v. Ogden* and *Brown v. Maryland*. We shall later acquit him of this charge; but for the present we are interested in the wavering issues of the early conflict.

Fate had conceived still further confusion of the subject, and in the travail of the times it was now brought forth. *New York v. Miln*<sup>2</sup> had come before the court for decision and, the justices being divided, a reargument was directed. Before the second argument, there had taken place that great change in the court

<sup>1</sup> 2 Pet. 245.

<sup>2</sup> 11 Pet. 102.

which cast out the genius of nationalism and enthroned the spirit of State rights and strict construction. Taney sat in the seat of Marshall; and the court which had for so many years construed the constitution in the federalizing spirit of Washington, was bent to the decentralizing will of Jackson. The new influence dominated the decision in *New York v. Miln*, and added chaos to the confusion which already attended the efforts to construe the commerce clause. The opinion of Mr. Justice Barbour, instead of settling the long controversy between the conflicting theories of exclusive and concurrent power, forced upon the field of constitutional construction a novel theory of its own. The State law here drawn in question, requiring every master of a vessel arriving in the port of New York from any port of another State or nation to make a report to the mayor of the name, place of birth and last legal settlement, age and occupation of every person brought as a passenger by the vessel on her last voyage, was justified as a regulation of internal police. The police powers, it was held, were reserved to the States in their entirety, unsundered and unrestrained by the Federal constitution. Laws passed in the exercise of these powers were to be considered valid, even though, in their operation, they regulated or impeded commerce. This position, which the majority opinion flattered itself was "impregnable," would have justified the passage by a State of any law regulating foreign or interstate commerce, provided only the enactment could be called an exercise of police power. This would have accomplished for the power of the States all or more than could possibly have been achieved by the establishment of the doctrine of concurrent power. Such doubtless was the hope of the majority and the fear of the sole dissenting justice. Story, the last survivor on the bench of the passing age of federalism, voiced a vigorous dissent against the introduction of the new and dangerous theory. He insisted strongly but vainly that the State law was just such a regulation of commerce as was condemned in *Gibbons v. Ogden*, and that the decision in that great case and in *Brown v. Maryland* demonstrated the entire exclusiveness of the Federal power. The pathos of the lonely position of Story on the reconstructed bench finds keen expression in his unavailing

protest that Chief Justice Marshall, having heard the first argument of the case, had agreed with both the conclusions and the reasons of his dissent.

It was reserved for *The License Cases*,<sup>1</sup> to demonstrate the full capacity of the court for disagreement upon the commerce clause. These cases drew in question the constitutionality of the liquor license laws of the States of Massachusetts, Rhode Island and New Hampshire. In the New Hampshire case,<sup>2</sup> Pierce had been convicted of selling without the license required by the State law, a barrel of gin bought in Massachusetts, brought coastwise into New Hampshire and sold there in the original package. The case differed from *Brown v. Maryland* only in the circumstance that the article sold was brought from another State instead of from a foreign nation. All of the justices agreed that the State laws were constitutional and that the judgments of conviction in all the cases should be affirmed; but not even a bare majority could agree on the reasons on which this result should be placed. There was, therefore, no opinion of the court. Nine dissonant opinions, by six differing justices, illustrate in this case the divergence of views on the bench, and typify the uncertainty of constitutional construction.

Taney, who as counsel for the State, had argued for the validity of the license laws condemned in *Brown v. Maryland*, confessed that he was then in error, and yielded allegiance to the views of his great predecessor in that decision. But, while making this concession, he contended, in a masterful argument, for the doctrine of concurrent power. *Brown v. Maryland* was distinguished from the case at bar by the statement "that the former was one arising out of commerce with foreign nations, which Congress had regulated by law; whereas the present is a case of commerce between two States, in relation to which Congress has not exercised its power." McLean, who was later, in the *Passenger Cases*, to become the champion of the theory of exclusive power, argued in the *License Cases* for the doctrine of the supremacy of the police powers of the State, which had formed the basis of the decision in *New York v. Miln*. In this view he

<sup>1</sup> 5 How. 504.

<sup>2</sup> *Pierce v. New Hampshire*.

was supported by the opinions of Justices Woodbury and Grier. Mr. Justice Catron ably seconded the effort of the Chief Justice to establish the theory of concurrent power, but made a vigorous attack upon the doctrine of the power of the States to enact regulations of commerce under guise of their police powers; his resonant rhetoric and inevitable logic on this point laying the foundation for the ultimate overthrow of this theory. Mr. Justice Daniel, though agreeing with Chief Justice Taney as to the power of the States to regulate commerce in the absence of congressional acts on the same subject, differed with him as to the correctness of the decision in *Brown v. Maryland*, and bitterly assailed the doctrine there established that the right to import carries with it the right to sell.

In spite of the chaos of opinion on the bench, the doctrine of concurrent power almost reached in *The License Cases* the goal of final adoption. An admitted regulation by a State of interstate commerce was clearly sustained by the judgment in that case, and four of the six justices who wrote opinions declared their allegiance to the concurrent theory. The opinion of the Chief Justice, though not the opinion of the court, was palpably designed to establish that doctrine as a finality. Not a solitary justice raised his voice in advocacy of the doctrine of exclusive power. In view of this fact, nothing more startlingly marks the halting course of judicial construction than the decision in the next case which involved the commerce clause.

The *Passenger Cases*,<sup>1</sup> presented the question of the constitutionality of laws of the States of Massachusetts and New York requiring masters of vessels to pay to the health officers of the State ports a certain sum for each passenger landed. The similarity of these laws with the regulations upheld in *New York v. Miln*, is to be noted. The pendulum now swung the other way, and the same court that had upheld the State license laws as commercial regulations within the power of the States, condemned the State passenger regulations on the express ground that they were regulations of foreign and interstate commerce,

<sup>1</sup> 7 How. 288.

and that the power of Congress on those subjects was exclusive. Under these circumstances and from such a court, came the first positive announcement, in so many words, of the doctrine of exclusive power as a controlling rule of decision. The judgment was by a bare majority, four justices dissenting, and every justice except one, who expressed his concurrence in the views of Taney, writing a separate opinion.

This definite adoption of the doctrine of exclusive power barely survived the case in which it was announced. When *Cooley v. Board of Wardens*,<sup>1</sup> came on for decision<sup>2</sup> the doctrine of *The Passenger Cases* was essentially modified. The five justices who composed the majority which confidently asserted the doctrine of exclusive power in 1849 were all on the bench when the *Cooley* case was decided. The only change in the court was among the minority, Mr. Justice Woodbury having been succeeded by Benjamin R. Curtis. The question presented was the constitutionality of a law of Pennsylvania establishing regulations of pilots and pilotages for the harbor of Philadelphia. The business of pilots had uniformly since the establishment of the Federal government been regulated by the States, and this fact had furnished one of the strongest of the arguments in favor of the existence of a concurrent power in the States on the subject. To hold those regulations void as conflicting with the exclusive power of Congress would have deranged the existing and necessary regulations of the subject and thrown the navigation laws into dire confusion. In the face of this predicament the champions on the bench of the contending theories of exclusive and concurrent power, with two militant exceptions, laid down their arms and submitted to a compromise of the doubtful conflict, dictated by the new member of the court. It was decided that whether the power of Congress to regulate commerce is exclusive or concurrent with a like power in the States, was to be determined not from the nature of the power itself, but from the nature of the subjects on which the power was to be exercised. "Whatever subjects of this power," it was held, "are in their nature national, or admit

<sup>1</sup> 12 How. 299.

<sup>2</sup> In 1851.

only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." As to the regulation of pilotage under consideration, it was held "that the nature of the subject is such that, until Congress should find it necessary to exercise its power, it should be left to the legislation of the States; that it is local and not national, that it is likely to be best provided for not by one system or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."

*Cooley v. Board of Wardens* marks the passing of the age of constitutional construction with which we have thus far dealt, and the coming of a new era. It put an end to the bitter controversy between the theories which had contended against each other for supremacy since the time of *Gibbons v. Ogden*, by deciding that both were right, and assigning to each its appropriate sphere of operation. Where the subject of regulation was local in its nature, the theory of concurrent power was to have application; where the subject was of a national nature, the exclusive theory was to prevail. Thus the *Cooley* decision built an effectual dam against the current of controversy that had so long beat against the court in cases involving the commerce clause, and turned the course of legal and judicial investigation of the subject into other and smoother channels. Henceforth the sole inquiry was to be, is the subject sought to be regulated local or national in its nature? if local, the regulation of it is within the field of State power; if national, it is removed entirely beyond the reach of State legislation.

It is a curious and interesting fact that the principle upon which the *Cooley* case was decided, and which finally brought peace to the troubled waters of constitutional construction upon the commerce clause, was clearly outlined by Mr. Webster in his comprehensive argument in the pioneer case of *Gibbons v. Ogden*. Though he insisted that the Federal power over commerce, as applied to the particular facts of the case then before the court, was necessarily exclusive, he foresaw what the decision in *Cooley v. Board of Wardens* finally asserted, that there might be subjects of commercial regulation of such a nature that

the power of the State might control them in the absence of congressional action. "He should contend," says the reporter's account of Mr. Webster's argument, "that the power of Congress to regulate commerce was complete and entire and *to a certain extent* necessarily exclusive; that the acts in question were regulations of commerce in a most important particular; and affecting it *in those respects* in which it was under the exclusive authority of Congress. He stated this first proposition guardedly. He did not mean to say that all regulations which might in their operation affect commerce were exclusively in the power of Congress; but that such power as had been exercised in this case did not remain with the States." It adds to our admiration for that great mind to know that not only was he the first expounder of the doctrine of exclusive power as applied to the commerce clause, and the advocate of the principle on which *Gibbons v. Ogden* was actually decided, but that he had also formulated, in advance of any judicial announcement upon these important questions, the principle which was finally to harmonize the conflicting views on the subject.

We may properly pause here, also, to note the entire harmony of the decision in *Wilson v. Black Bird Creek Marsh Company* with the rule announced in *Cooley v. Board of Wardens*. The *Black Bird* case was merely the forerunner of that long line of cases which, since *Cooley v. Board of Wardens*, have consistently upheld the power of the States to authorize obstructions to navigable streams, in the absence of congressional action.<sup>1</sup> In this light the apparent inconsistency between the opinion in the *Black Bird* case and the other opinions of Marshall on this subject entirely disappears. Marshall merely applied in that case the thought suggested by Webster's argument in *Gibbons v. Ogden* and afterwards formulated into a rule of decision in *Cooley v. Board of Wardens*, that on subjects local in their nature the regulations of the States are valid in the absence of congressional action.

The necessity to insure entire freedom from State regulation

<sup>1</sup> *Gilman v. Philadelphia*, 3 Wall. 107 U. S. 678; *Willamette Iron Bridge* 718; *Escanaba Company v. Chicago*, *Company v. Hatch*, 125 U. S. 1.



of the passage of persons and property from State to State, we have seen, was the moving force that brought about the adoption of the constitution. The first application of the principle of *Cooley v. Board of Wardens* to cases of interstate transportation was in harmony with that historic fact. In the case of the *State Freight Tax*,<sup>1</sup> and in *Wabash &c. Railway Company v. Illinois*,<sup>2</sup> it was held that the subject of the interstate transportation of persons and property was of such a national nature as to require a uniform plan of regulation, and that therefore the power of Congress to regulate it was exclusive. This principle was reasserted in *Bowman v. Chicago and Northwestern Railway Company*,<sup>3</sup> where the liquor laws of Iowa, in so far as they prohibited the transportation by a common carrier of intoxicating liquors from another State into Iowa, except for persons licensed to sell under the State laws, were held to be "an unauthorized interference with the power given to Congress over the subject." The doctrine of *The License Cases* was thus seriously undermined, though not overthrown; and the spirit of iconoclasm in the court struck its hammer, with fatal force, at the theory of the supremacy of the police powers of the State, asserted in *New York v. Miln*. Thus was won a late though complete victory for the vigorous assault made upon the *Miln* case by Mr. Justice Catron in *The License Cases*; and the doctrine was finally established that a State cannot, in the acknowledged exercise of its police powers, "regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be." The *Miln* theory of the State police power, however, still found three ardent adherents on the bench.

*Bowman v. The Railway* foreshadowed *Leisy v. Hardin*.<sup>4</sup> This case decided that the right of transportation from one State to another, which the *Bowman* case held was beyond the range of State regulation, carried with it, as a necessary incident, the right to sell in the original package and that the right to sell, equally with the right to transport, was shielded

<sup>1</sup> 15 Wall. 232.

<sup>2</sup> 118 U. S. 557.

<sup>3</sup> 125 U. S. 465.

<sup>4</sup> 135 U. S. 100.

by the commerce clause from the legislative power of the State. This ruling was the exact antithesis of the decision in *Pierce v. New Hampshire*; and the latter case, which had stood unquestioned for nearly half a century, was here finally overthrown. *Leisy v. Hardin* took stand on the high ground where *Brown v. Maryland* was firmly fixed, and threw around the importation from a sister State the same Federal protection which that great decision had long afforded imports from foreign nations.

Constitutional construction had now seemingly emerged from the fog that had so persistently obscured the scope of the commerce clause. The hope of the fathers in framing this feature of the constitution seemed at last to be realized. A great trinity of constitutional decisions, *Brown v. Maryland*, *Bowman v. The Railway* and *Leisy v. Hardin*, promised to accomplish the purpose of its adoption, namely: the protection of the importation, transportation and sale of articles of commerce from any regulation by the States.

But the fatality which had wrought the overthrow of so many established theories in the long course of judicial interpretation of the commerce clause, had not overlooked the *Bowman* case or *Leisy v. Hardin*. In little more than a year after the latter case had been decided, the laws which were there condemned as regulations of interstate commerce upon subjects within the exclusive power of Congress to regulate were solemnly adjudged by the same court to be a valid exercise of State power.<sup>1</sup>

Novel and unnecessary suggestions in the opinion in *Bowman v. The Railway* and *Leisy v. Hardin* were themselves responsible for this startling result. In the *Bowman* case Mr. Justice Matthews had said: "So far as these regulations (certain acts of Congress concerning transportation) made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress." \* \* \* "It (a State) cannot *without the consent of Congress*, express or implied, regulate commerce between its

<sup>1</sup> In re *Rahrer*, 140 U. S. 545.

people and those of the other States of the Union." Mr. Chief Justice Fuller quoted these suggestions in his opinion in *Leisy v. Hardin* and thus reinforced them in his own language: "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, *or allowing the States so to do*, it thereby indicates its will that such commerce shall be free and untrammelled. \* \* \* The conclusion follows that as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power *without the assent of Congress*." These, with other like expressions in the same opinions, are, I believe, the first and the only suggestions in the books that Congress might permit the States to exercise a power which the constitution has exclusively confided to Congress. The novelty of the idea is attested by the promptness with which it was acted upon. The decision in *Leisy v. Hardin* was rendered in April, 1890. In August of the same year Congress passed a bill known as the Wilson bill, which reads as follows: "That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

"In this," in the language of Mr. Justice Field,<sup>1</sup> "we are furnished with a striking illustration of the facility with which power is assumed from expressions loosely, but inadvertently used, apparently recognizing its existence."

The case of *In re Rahrer*,<sup>2</sup> brought before the court a case precisely like *Leisy v. Hardin*, except that in *Rahrer's* case the violation of the State law, consisting in the first sale of a pint

<sup>1</sup> *Bridge Company v. United States*, 105 U. S. 494.

<sup>2</sup> 140 U. S. 545.

of whisky in the original package in which it had been brought into the State from another State, had taken place after the Wilson Act had been approved. Although the suggestions of the doctrine of the permission of Congress in *Bowman v. The Railway and Leisy v. Hardin*, were undoubtedly responsible for the passage of the Wilson Bill, the Supreme Court did not uphold the validity of the enactment on that ground. It had been too often declared that Congress could not give a right to a State in virtue of its own powers, or enable a State to legislate,<sup>1</sup> or restore to the States the power of which they were deprived in the commerce clause;<sup>2</sup> or delegate to a State power to pass an act amounting to a regulation of interstate commerce.<sup>3</sup> It was impossible, therefore, to establish as a rule of decision the doctrine suggested *arguendo* in the *Bowman* and *Leisy* cases, that Congress might permit the States to enact regulations of commerce upon subjects national in their nature. But though the doctrine that had produced the Wilson Bill was not potent to justify it, another doctrine, whose ancient birth and frequent repetition had never suggested to the legislative mind the passage of such an act, was pressed into service to give the Wilson Bill efficacy. This doctrine has been called the doctrine of the silence of Congress.

For the first suggestion of this doctrine we turn again to the fecund argument of Webster in *Gibbons v. Ogden*. "All useful regulation," he said, "does not consist in restraint; and that which Congress sees fit to leave free, is a part of its regulation as much as the rest." Webster's meaning was that the power of Congress covered the entire subject, excluding altogether any power in the States; and that the States were just as impotent to regulate a subject which Congress, by its silence, meant should be free from regulation, as they were powerless to regulate another subject which Congress, by express act, had subjected to regulation. So Marshall understood the argument.<sup>4</sup> Such was the meaning of Mr. Justice Grier, who next used the

<sup>1</sup> Marshall, Ch. J., in *Gibbons v. Ogden*.

<sup>2</sup> *Stoutenburgh v. Hennick*, 129 U. S. 141.

<sup>3</sup> Taney, Ch. J., in *The License Cases*.

<sup>4</sup> *Gibbons v. Ogden*, at p. 198.

idea, in his opinion in *The Passenger Cases*. And such was the spirit in which Mr. Justice Field formulated the principle in *Welton v. Missouri*.<sup>1</sup> "The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its action on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled." In almost every subsequent case in which attempted State regulations of commerce were called in question, the statement has been repeated that the silence of Congress upon any particular subject was an indication of the congressional will that the subject should be free and unregulated.

The opinion in the *Rahrer* case, interpreting the decisions in the *Bowman* and *Leisy* cases in the light of this doctrine, concludes that the State laws condemned in those cases were invalid because in conflict with the will of Congress, implied from its silence, that the subject of the interstate transportation and sale of commercial commodities should be free from any regulation. "It followed as a corollary," says the *Rahrer* opinion, "that, when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured. Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature \* \* \* Congress did not use terms of permission to the State to act, but simply *removed an impediment to the enforcement of the State laws* in respect to imported packages in their original condition, *created by the absence of a specific utterance on its part*. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

In other words, the will of Congress, and not the impotency of the State, deprived the State laws of vitality. The State had power to pass the laws, which were confessedly regulations of commerce upon subjects national in their nature and therefore

<sup>1</sup> 91 U. S. 275.

requiring one uniform plan of regulation; but the laws could not be enforced so long as Congress, by its silence, indicated its will that those subjects should be free from regulation. As soon as Congress broke its silence and negated by positive action the implication arising from its silence, the laws of the State became operative, and the interstate transportation and sale of intoxicating liquors, admittedly legitimate articles of commerce, became subject to the State regulation. Thus the doctrine of the silence of Congress, which was, in its original and previous application, a denial of the theory of concurrent power, was made the means of the final triumph of that theory and the complete overthrow of its ancient rival, the doctrine of exclusive power. Thus also, was cast aside the salutary and hitherto accepted rule of decision announced in *Cooley v. Board of Wardens*. That case decided that the States have power to regulate subjects of commerce local in their nature until Congress shall regulate the same subject; but as to subjects national in their nature the States have no power at all to regulate, whether Congress regulates or not. That is, as to subjects national in their nature, the States suffer from an organic infirmity, imposed by the commerce clause of the constitution, which "withdraws the subject," in the language of *Smith v. Alabama*<sup>1</sup> "as the basis of legislation altogether from the States." The conception of the exclusiveness of the Federal power necessarily involves the conclusion that any State legislation attempting to exercise that power is void, not as being in conflict with the will of Congress expressed or implied, but as an attempted exercise of power of which the States, under the Federal constitution, are totally divested. A subject which admits of exclusive legislation by Congress cannot admit of *any* legislation by the States; and this is so whether Congress has or has not legislated on the subject. This was perfectly clear until the decision of the *Rahrer* case. The rule of that case is that the States have concurrent power to enact regulations on *all* subjects; the enforcement of their regulations depending in all cases upon the will of Congress. As to local subjects the en-

<sup>1</sup> 124 U. S. 464.

forcement of the State laws is permitted by the silence of Congress and impeded by its action; as to national subjects the enforcement of the State laws is impeded by the silence of Congress and permitted by its action.

The exclusive theory was not the only victim to suffer by the Rahrer decision; the rule of *Leisy v. Hardin* was expressly nullified, and *Bowman v. The Railway* rendered practically valueless. Since the Rahrer decision the Supreme Court of Iowa, applying the rule there announced, has held that the act of transportation which was protected in the Bowman case from State interference, is now prohibited by the same State law that was there held to be void as a regulation of commerce of such character as Congress alone was authorized to make.<sup>1</sup> Thus neither the transportation nor the sale of intoxicating liquors is now protected by the commerce clause against the prohibitory laws of the States.

This result has been reached without detracting one whit from the established character of intoxicating liquors as legitimate articles of commerce. It follows that what Congress has done in the Wilson Bill for intoxicating liquors, it may do for any and all commercial commodities. Already a bill, in the image of the Wilson Bill, has passed the House and is pending in the Senate, which surrenders oleomargarine to State regulation, although the power of the State to prohibit the importation and sale of that admittedly harmless article of food, when colored in imitation of butter, has already been established by a decision that divided the court.<sup>2</sup> Every other commodity, the commerce in which affects injuriously special interests or particular localities, may become as likely a candidate as oleomargarine for similar Congressional distinction; and eventually each State, in proportion to its influence and power in Congress, may secure the passage of laws which would permit it to regulate or prohibit the importation and sale of any commodity which it might deem harmful to the health or morals of the community or inimical to its industrial growth or welfare.<sup>3</sup> The imported package of dry

<sup>1</sup> *State v. Rhodes*, 90 Ia. 496.

<sup>2</sup> *Bowman v. The Railway*, 125 U.

<sup>3</sup> *Plumley v. Massachusetts*, 155 U. S., at p. 494.  
S. 471.

goods that forced the great pronouncement in *Brown v. Maryland*; the Texas cattle that found their way into Missouri under the ruling of *Railroad Company v. Husen*; <sup>1</sup> and the dressed meats protected from State exclusion in *Minnesota v. Barber*, <sup>2</sup> and *Brimmer v. Rebman*, <sup>3</sup> may, by acts of Congress, be permitted to fall within the local jurisdiction, and those triumphs of constitutional construction will be preserved in the reports only as shrouds of a mummified legal principle, and as relics of a constitutional and commercial epoch that has passed away. Thus the great constitutional bulwark to the freedom of interstate transportation and sale of articles of commerce, which our forefathers thought they had erected in the commerce clause, may be blown down by the breath of Congress. Such is the startling result of more than a century of constitutional construction.

The power confided to Congress in the commerce clause, is the power to regulate commerce, not to permit its regulation by the States. It is impossible that any act passed by Congress in pursuance of the commercial power should prescribe anything but "one uniform system or plan of regulation." A Federal law is beyond conception, which should declare that the transportation and sale of oleomargarine should be lawful in Missouri and unlawful in Massachusetts, or that a common carrier should be compelled in Illinois to receive intoxicating liquors for transportation into Iowa, and punished in Iowa for the performance of the act enforced in Illinois. Yet, inconceivable as it is that Congress should itself pass such a law, it has, in the Wilson Bill as construed in the *Rahrer* case, permitted the enforcement of State laws which have, as to intoxicating liquors, precisely that effect. Such a recognition of State laws upon a subject the regulation of which was intrusted solely to Congress for the express reason that in its nature it requires "one uniform system or plan of regulation" is essentially a restoration to the States of that sovereign power of regulation, the diverse exercise of which produced the commercial anarchy and confusion that reigned during the Confederation.

<sup>1</sup> 95 U. S. 465.

<sup>2</sup> 136 U. S. 813.

<sup>3</sup> 138 U. S. 78.



That such was its purpose we have the high testimony of one of the justices who concurred in the Rahrer decision. "The effect of this enactment," he says, "seems to me to withdraw intoxicating liquors from the operation of the commerce clause of the constitution. \* \* \* The State legislatures, \* \* \* with respect to the subject of intoxicating liquors, are, since the passage of the Wilson Bill, untrammelled by the Federal constitution."<sup>1</sup>

I nowhere find it provided in the Federal constitution that an act of Congress may relieve the States from the trammels of that instrument.

Possibly the Wilson Bill might have been justified as a Congressional regulation of commerce had it been construed as a declaration by Congress that intoxicating liquors were no longer to be considered subjects of legitimate commerce. The exclusive power of Congress "to determine the articles which may be the subjects of commerce" seemed to be conclusively asserted by the adoption in the Bowman case of Mr. Justice Catron's views and language in *The License Cases*.<sup>2</sup> But it has just been held that the application of the Wilson Bill to the liquor laws of a State depends upon the question whether the State itself recognizes intoxicating liquors "as articles of lawful consumption and commerce."<sup>3</sup> This concedes to the State not only the power to regulate, but the more dangerous power to "determine what shall or shall not be regulated." "Upon this theory," in the language of Mr. Justice Catron, quoted with approval in the Bowman case, "the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated."

<sup>1</sup> Brown, J., dissenting, in *Scott v. Donald*, 165 U. S., at p. 106.

<sup>2</sup> 125 U. S., at p. 490.

<sup>3</sup> *Scott v. Donald*, 165 U. S. 58.

Not only, therefore, has the *Rahrer* case extended to all subjects, national as well as local, the application of the doctrine of concurrent power; but *Scott v. Donald* has revived the essential principle of the doctrine of the supremacy of the State police power, asserted in *New York v. Miln* and formally overthrown in *Bowman v. The Railway*.

While the growth, under constitutional construction, of the power of the States to regulate the subjects of interstate commerce thus challenges startled attention, their power to regulate the instruments of that commerce has reached no less remarkable a stage of development. And the course of judicial sentiment on this question is marked by similar fluctuations of opinion, and by like wreckage of discarded decisions. In *Osborne v. Mobile*,<sup>1</sup> it was held that an ordinance of the city of Mobile imposing an annual license fee upon every express or railroad company doing an interstate business in the city was not repugnant to the commerce clause. It was the opinion of the court that the license, although a burden upon interstate commerce, was such a regulation as might lawfully be imposed by a State, under its concurrent power, in the absence of Congressional action on the subject.

In *Leloup v. Port of Mobile*,<sup>2</sup> precisely the same question was presented. The opinion here prevailed that the subject fell within the exclusive power of Congress, and the *Osborne* case was expressly overruled. It was held that the fact that a portion of the company's business was internal to the State of Alabama, and therefore taxable by the State, did not authorize the imposition of a general license fee. "The tax," say the court, "affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some way, may be subjected to taxation without the imposition of a tax which covers the entire operations of the company." It was concluded that "no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of commerce, or on the receipts derived from that transportation, or on the

<sup>1</sup> 16 Wall. 479.

<sup>2</sup> 127 U. S. 640.

occupation or business of carrying it on; and the reason is, that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress." It would seem, after this announcement, that no State could ever impose a license fee upon a company engaged in the business of the interstate transportation of property; but constitutional construction has found a way, not, indeed, to overrule *Leloup v. Port of Mobile*, but to deprive interstate carriers of the benefit of that decision. A law of the State of Florida, passed in 1893, provides that all express companies doing business in the State shall pay in every city, town and village in which they do business a license tax, graduated according to the size of the place. The language of the law nowhere recognizes or suggests a distinction between the local and the interstate business of the companies. In its terms, "the tax," like the tax in *Leloup v. Port of Mobile*, "affects the whole business without discrimination." The Florida Supreme Court, however, construing the act, held in express terms that it did not apply to or affect in any manner business which is interstate in its character, but only business which is done within the State, and that under the statute, so far as an express company confines its operations to express business consisting of interstate or foreign commerce it was wholly exempt from the legislation (a valuable exemption, indeed, in view of the legal obligations of common carriers). The Supreme Court of the United States, adopting this construction of the State law by the court of the State, has held that the license law is not obnoxious to the commerce clause.<sup>1</sup> It is therefore now possible, in spite of *Leloup v. Port of Mobile*, for a State to impose any kind or number of license fees upon interstate carriers; and the imposition will be sustained in the Federal Supreme Court provided only the State legislature shall declare, or the State Supreme Court hold that the license, though general in its terms, affects the company only in relation to its local business.

In *The Case of the State Tax on Railway Gross Receipts*,<sup>2</sup> it was held that a State might impose a tax upon the gross receipts

<sup>1</sup> *Osborne v. State of Florida*, 164 U. S. 650.

<sup>2</sup> 15 Wall. 284.

of a transportation company, even though the receipts were partially derived from interstate business. In *Fargo v. Michigan*,<sup>1</sup> this case met the fate of *Osborne v. Mobile*, and was expressly overruled. The doctrine of *Leloup v. Port of Mobile* was there firmly established, that "no State has the right to lay a tax on interstate commerce in any form." The decision in *Fargo v. Michigan* is amply buttressed by other like rulings of the court.<sup>2</sup> But the doctrine of that case, though still in theory a recognized rule of decision, no longer affords in practice any protection to the interstate carrier against the taxing power of the States. The recently developed theory of the unit value of property devoted to interstate transportation, under which a State may determine the value of such property for taxing purposes not alone by the actual value of the property within the State, but by imparting to such property a portion of the unit value on a mileage basis, or in such ratio as the State may itself deem proportionate to the actual value or the earning power of the property within the State, has brought within reach of the taxing arm of every State, in effect though not in name, all those elements of interstate commerce that were formally removed beyond that reach in *Fargo v. Michigan*.<sup>3</sup> It is perfectly palpable that into the unit value of an agency of interstate transportation there enter — in addition to the value of the several State franchises and of the tangible property in every State — the value of the Federal franchise, inhering in the constitution and expressed in the statutes, to transport property from State to State, free from State regulation; the value of the occupation or business itself; and the value of the receipts derived therefrom. All these elements of value it has been expressly held are beyond the reach

<sup>1</sup> 121 U. S. 280.

<sup>2</sup> *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196; *Philadelphia Steamship Company v. Pennsylvania*, 122 U. S. 826; *Western Union Telegraph Company v. Alabama*, 137 U. S. 472.

<sup>3</sup> *Pullman's Palace Car Co. v. Penn-*

*sylvania*, 141 U. S. 18; *Massachusetts v. Western Union Telegraph Co.*, 141 U. S. 40; *Maine v. Grand Trunk Railway Co.*, 142 U. S. 17; *Pittsburg &c. Railway Co. v. Backus*, 154 U. S. 421; *Telegraph Company v. Taggart*, 163 U. S. 1; *Adams Express Co. v. Ohio*, 165 U. S. 194.

of the taxing power of the States.<sup>1</sup> But taxation by a State of a proportion of the unit value, thus composed, is as clearly taxation of the component elements as though each constituent part of the unit value were categorically set down on the tax lists. And it matters not whether the imposition is called a tax on tangible property, as in *Adams Express Company v. Ohio*, where certain horses, wagons, harness, trucks, safes and office fixtures actually worth less than \$100,000 were taxed on a valuation of over \$1,500,000 because they were used in the prosecution of a vast and profitable interstate transportation business; or a tax on intangible property, as in *Adams Express Co. v. Kentucky*,<sup>2</sup> where like property worth less than \$40,000 was taxed, for like reasons, on a valuation of nearly \$1,500,000, and in *Henderson Bridge Company v. Kentucky*,<sup>3</sup> where to the actual value of the bridge property in Kentucky was added an assessment of over \$865,000 upon the "franchise" of a company doing solely an interstate business; or a commutation of *ad valorem* taxes for a just equivalent, as in *Postal Telegraph Cable Co. v. Adams*,<sup>4</sup> where an imposition in name and nature a tax for the privilege of carrying on interstate business was sustained by an inharmoonious court. The States will not object to the names by which their levies are called, provided under any name they may tax interstate commerce; and novelties in nomenclature will hardly compensate the carriers for deprivation of their constitutional rights.

It has been my purpose to record rather than to criticise the variations in judicial decision affecting the commerce clause; but when four members of the court join in vigorous dissent from the doctrine of the last cited cases the bar may at least indulge a doubt as to its absolute wisdom. Temerity may even go a step farther, and express the conviction that the power of regulation of both the subjects and the instruments of interstate commerce, which the trend of recent decision confirms in the States, is neither in furtherance of the high purposes that inspired the

<sup>1</sup> *California v. Cal. Pac. Ry. Co.*,  
127 U. S. 1; *Leloup v. Port of Mobile*,  
*supra*.

<sup>2</sup> 166 U. S. 171.

<sup>3</sup> 166 U. S. 150.

<sup>4</sup> 155 U. S. 688.

adoption of the commerce clause, nor in harmony with great principles once dominant in the construction of the power there conferred. Memory of "the oppressed and degraded state of commerce previous to the adoption of the constitution" would seem to have been out of the judicial mind when these opinions were penned. The national spirit, which found the cure of that condition in the formation and liberal endowment of a strong central government, never inspired these latter-day pronouncements; nor did the genius of Federalism, which formerly strove for the establishment of the doctrine of exclusive Federal power, preside at their preparation. Even the compromise concluded in the *Cooley* case seems to have lost power to dictate the decision of the court.

A return to the doctrine that Congress has exclusive power to regulate (including the power to tax) interstate commerce in these its national aspects will better exemplify and effectuate the spirit in which this great power was taken from the States and conferred upon the national authority, and lay more firmly the foundation for an enduring construction of the commerce clause in the difficult questions that are yet to confront the court. If, in the language of Mr. Justice Brown,<sup>1</sup> "manifest dangers to the future of the country \* \* \* lurk in the inflexibility of the Federal constitution," the dangers will hardly be averted by introducing that flexibility which flows from the abandonment of established principles. If the commerce clause relieves corporations engaged in interstate commerce from what the courts may deem their just burdens of State regulation and State taxation (and this is the spirit in which the opinion denying a rehearing in the *Express Cases* is conceived),<sup>2</sup> that is a condition produced by the Federal constitution, which it is not the province of the courts to change. The fear "that, unless constitutional safeguards be overthrown, harm will come, and wrong will be done," should never lead to the conclusion, in the protesting language of Mr. Justice White, "that our institutions are a failure, that time has proven that the constitution should not have been adopted, and that this (the Supreme) court should now recognize

<sup>1</sup> *Scott v. Donald*, at p. 106.

<sup>2</sup> *Adams Express Co. v. Ohio*, 166 U. S. 185.

that fact, and shape its adjudications accordingly." Besides, the fear that affirmed the State power of taxation in these cases, has no practical foundation. Even if the States lack power to regulate and tax these national elements of commerce, Congress has plenary power in that direction, and may impose, with heavy hand, all the burdens that interstate commerce can bear. Its silence on the subject is equivalent to a declaration that, in these particulars, interstate commerce shall be free and unregulated. The legitimate avenue of escape from the perils that appalled the judicial mind, lies in an adequate exercise by Congress of its admitted power to regulate and tax interstate commerce, rather than in a judicial restoration to the States of "the surrender which they have made to a common government to regulate commerce for the benefit of all of them."<sup>1</sup>

<sup>1</sup> Wayne, J., in *Passenger Cases*, 7 How., at p. 419.

## PROOF OF FRAUD UNDER DENIAL.

The article written by Judge Thompson<sup>1</sup> entitled, "Setting Up Fraud and Illegality: General Denial," is a vigorous and lucid exposition of the question discussed; but may it not be urged that the subject is not exhausted? Are all the decisions which he criticises obnoxious to the objections made? Is the reasoning of these courts in all instances a proof of judicial aberration? May they not be sustained as consistent with the logic of code pleading, at least as much so as countless rulings which are daily received without question wherever the code prevails?

It is said that one object of the reformed procedure is to secure such a statement of the ultimate facts in issue as shall apprise an opponent of what he may expect to meet at the trial. Yet, we are told that negligence is an ultimate fact in issue which may be pleaded without setting forth the probative matters to sustain it. While there is some dissent from this view, it is sustained by the overwhelming weight of authority.<sup>2</sup>

It is matter of common learning that, under a denial of the contract pleaded in the complaint as the cause of action, proof may be introduced upon the part of the defendant that the one with whom he did in fact enter into the agreement was not the plaintiff, but a third person, not referred to in the pleadings. Many other analogous cases will occur to the lawyer familiar with the rules of pleading.

While these cases may be clearly distinguishable from those discussed by Judge Thompson, yet they are illustrations of the fact that even the code has failed to secure in all instances a specific notification of just what will be proved upon the trial.

The learned author seems to think the decision in *Young v. Glasscock*,<sup>3</sup> a case illustrative of mental "aberration" upon the

<sup>1</sup> 31 American Law Review, 535.

*v. Ry. Co.*, 34 Mo. 235; *Oldfield v. Ry.*

<sup>2</sup> Bliss Code Pldg., §§ 211, citing  
*Grinde v. Ry. Co.*, 42 Ia. 377; *Gardner*

*Co.*, 14 N. Y. 810.

<sup>3</sup> 79 Mo. 574.



part of the court. The view entertained by the court is certainly sustained by the weight of judicial authority; but is it illogical? The theory of this case is simply that, in an action of replevin, the defendant may show under the general issue that the goods in controversy are the property of a third person held by defendant, as sheriff, under a writ of attachment, and that the plaintiff's claim is merely colorable; that the sale of the plaintiff, unaccompanied by possession of the goods, is void *ab initio*. The writer may himself be suffering from this same intellectual "aberration:" he may have lost whatever "gray matter" his brains ever possessed; his conscience may have been "burned out by long contact with the conscienceless work of the practicing lawyer;" at least he is obtuse to this extent: he is utterly lacking in the ability to see how these strictures upon a judicial utterance, fortified by the weight of authority and logically correct, can successfully overturn the rule adopted.

What is the issue in replevin? Like ejectment it is ownership or the right to possession. It will not be controverted that a complaint setting up the ownership of the plaintiff states a cause of action. Then the conclusion is irresistible that a denial of ownership presents to the triers of fact the simple question as to who owns the property, real or personal. Certainly an answer need be no more specific than a complaint, and no matter how many pretended sales may have been made, the subject of ultimate inquiry must be: Who at last is the owner.

The Supreme Court of Oregon in a recent case<sup>1</sup> have decided this question apparently in conformity with the views of the learned editor of the AMERICAN LAW REVIEW, yet the reasoning of the court is certainly obnoxious to criticism, even if the opinion of the court does not in itself disclose its own refutation. That was a case of replevin, and, under a denial, the defendant offered and was permitted by the trial court to show such fraud, inhering in the title of the plaintiff, as that he could not properly claim the rights of an owner. Yet the Supreme Court reversed the judgment, holding this ruling error. "How could plaintiff," says the court, "be notified of the

<sup>1</sup> Coos Bay R. R. Co. v. Siglin, 26 Ore. 387; s. c. 38 Pac. R. 192.

defense intended to be interposed unless it is disclosed by the answer?" And again, "Defendant then attempted to avoid the deed" (of assignment) "by proof of circumstances tending to show that it was given in fraud of the rights of creditors, and void for that reason. This testimony was not admissible. Fraud must be specially pleaded in an answer as well as in a complaint. There were no facts stated in the answer apprising the plaintiff that his title would be assailed in this manner."

This forsooth: "In an answer as well as in a complaint;" so then an averment of ownership in the complaint is no longer sufficient. Hereafter when one's house is burglarized and the goods have gone into the hands of innocent third persons a recovery of the property may not be had by the owner, until he has set forth all the *indicia* of his title including a recitation of the breaking and entering, the sale by the thief to the one in possession, and all other circumstances throwing light upon the question. Then indeed will code pleading merit the assertions of the late Charles O'Conner: "A statement of facts such as any old woman would recite to her neighbor."

And even Prof. Pomeroy says: "When the action is brought to recover possession of goods, the complaint alleging title or right of possession in the plaintiff, the defendant may, under the general denial, introduce evidence to show that the plaintiff is not the owner nor entitled to possession of the chattels, but cannot show that the plaintiff's title is fraudulent and *void* as against creditors."<sup>1</sup> The italics are mine. A clear instance of *felo de se*; another proof that Homer sometimes nods. Indeed no court or writer has had the temerity, ostensibly at least, to attempt to differentiate an answer from a complaint. A general allegation of ownership and right to possession is sufficient. The other matters are evidential of title.<sup>2</sup>

<sup>1</sup> Pomeroy Code Remedies, § 678, citing *Frisbie v. Langworthy*, 11 Wisc. 375.

<sup>2</sup> *Farwell v. Hanchett*, 19 Bradw. 623. And supporting what is believed to be the true rule, see *Sane v. Sparks*, 75 Ind. 279; *Stern v. Mason*, 16 Mo. App. 473; *Young v.*

*Glasscock*, 79 Mo. 574; *Sopris v. Truax*, 1 Colo. 89; *Bailey v. Swain*, 45 Oh. St. 657; *Holmberg v. Dean*, 21 Kansas, 73; *Merrill v. Wedgwood*, 25 Neb. 283; *Hunter v. Co.*, 20 Barb. 493; *Bliss v. Cottle*, 32 Barb. 322; 21 N. W. R. (Minn.) 737; *Matteawan Co. v. Bentley*, 13 Barb. 641.

If a proper regard were had to the nature of the proceeding, the office to be performed by a plea in confession and avoidance, under what circumstances the latter is appropriately to be pleaded and when a denial raises the issue, much obscurity would be avoided.

Payment is ordinarily matter in confession and avoidance, because it admits that the plaintiff had a good cause of action, but it had been destroyed by an act subsequent to its accruing; yet in ejectment upon a tax title, the fact that the defendant has paid the tax before the sale need not be pleaded. Why? Because, if true, the plaintiff never had a title; never was the owner of the property; and in this instance the fact of payment may be shown under a denial, because it establishes the want of title in the plaintiff, but does not admit the cause of action and then defeat it by showing a subsequent act having that effect. This view accords with reason; it is logical, and we find it to be the judicial view. Say the Supreme Court of Wisconsin: "Neither was there any error in admitting evidence of the payment of the tax, on the sale for which the plaintiff's title was based, without having pleaded such payment in the answer. The complaint in an action to recover real estate is general. It does not set forth the plaintiff's title, but simply alleges ownership and a right to the possession. Under this he is allowed to show any title that he can. And from the necessity of the case, the defendant, under a mere denial, must be allowed to prove anything tending to defeat the title which the plaintiff attempts to establish."<sup>1</sup>

It seems that the true rule, alike applicable to cases arising upon contracts as otherwise, should be this: Wherever a party invokes the aid of a contract or transaction which is to such an extent tainted with illegality as to be absolutely void, such transaction cannot be made the basis of a recovery, but may be ignored by the one attacking it and its invalidity shown under the general issue. If, however, the transaction be not absolutely void, void *ab initio*, if you will, then, of course, it would stand until set aside. Here, perhaps, if not previously avoided by the

<sup>1</sup> *Lain v. Sheperdson*, 23 Wisc. 228.

act of the party, notice should be required of the pleader; but if it has been so avoided, if the one endeavoring to profit by the fraud has been notified of the rescission, then the act, though binding until avoided, has become absolutely void; and no reason is perceived why this latter case is distinguishable from the former.

It is asserted in the article referred to that the "rule under consideration demands that fraud, illegality or the like \* \* \* should be specially pleaded, but it goes further and exacts that it should be pleaded with particularity as to time, place and circumstances." This is undoubtedly true where such a specific plea is required. Yet, even here, the omission of time and place would not render valueless the plea. It might be subject to a motion, performing the same office and functions as the special demurrer at common law, but nothing more.

It is submitted that the views above expressed are not subversive of the true principles of code pleading, but rather promotive thereof, that they accord with a correct logic and common sense, and are to be preferred to the modern spirit of extreme innovation and iconoclasm, which would overturn that which is best in our inherited wisdom, merely because it possesses the stamp of antiquity, which is vainly thought to have been obliterated by the march of novel improvement.

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## STATUS OF A WIFE IN INTERNATIONAL MARRIAGES.

The nationality and rights and liabilities of a wife by virtue of international marriage, where such a wife was, prior to the marriage, a citizen of the United States, have given rise to many interesting controversies.

There is no express provision of the United States laws upon the subject. Four attorney-generals have given opinions upon the question as to the effect of a female citizen marrying an alien husband, two holding that she became an alien, and the other two that she remained a citizen.

It is, at present, admitted law by nearly all civilized countries, except the United States,— that a woman upon marrying a foreigner acquires his and loses her own nationality. Before the passage of the British Naturalization Act <sup>1</sup> the English rule upon this subject, based upon the maxim *nemo potest exuere patriam* did not admit that an Englishwoman could by marriage lose her English nationality. This rule was adopted in the United States with the adoption of the English common law.<sup>2</sup> The effect of the English rule was to produce a continual conflict of law.

As the Napoleonic Code has formed the basis of many European civil codes of the present day, and the lack of space prevents the writer from going more fully into the subject, the French law is cited as an example of similar provisions of law which are in force upon the continent.

To illustrate the conflict, referred to above: English and American women upon marrying Frenchmen acquired a French nationality under French law, without losing their English and American nationality under their own law.

The inconvenience and uncertainty of this system, and the progress made in the development of international law, led

<sup>1</sup> 33 & 34 Vict. c. 14.

<sup>2</sup> *Shanks v. Dupont*, 3 Pet. 243.

Great Britain to abandon the principle *nemo potest exuere patriam*, and to enact the law cited. Conflict, therefore, between France and England upon this subject is no longer possible. The statute of 1870, passed for the purpose of carrying out the agreement between England and the United States as to the abandonment of the maxim *nemo potest exuere patriam*, dealt only with the part of the question which had most political importance for the United States at that time, namely, the right of British subjects to denationalize themselves by becoming American citizens, and the right of American citizens to denationalize themselves by becoming British subjects. The question of the status of woman citizens married to foreigners was not treated.

As the American theory of the status of woman citizens married to foreigners was apparently based on the maxim stated, and that maxim was repudiated by the Naturalization Act of 1870, it seems logical to infer that there is no longer any good grounds for the United States to hold out against the rule so generally adopted and enforced by other countries.

This line of reasoning seems to have been followed in the case of *Pequignot v. City of Detroit*,<sup>1</sup> in which it was held that an alien woman who has once become an American citizen by operation of law, viz., by a marriage, which is subsequently dissolved, may resume her alienage by a marriage to an unnaturalized native of her own country, and that residence is only *prima facie* evidence of citizenship; hence, where plaintiff, a native of France, came to this country in her childhood and was afterward married to an American citizen, and this marriage was dissolved, and she was again married to a native born French citizen, it was further held that she was an alien and competent to sue in the Federal court, notwithstanding she and her husband continued to reside in this country.

The Revised Statutes of the United States<sup>2</sup> provide that any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be naturalized, shall be deemed a citizen.

The learned judge, in the above decision, held that we ought

<sup>1</sup> 16 Fed. Rep. 212.

<sup>2</sup> Sec. 1994.

to apply the maxim *cessante ratione, cessat lex*, to the case, and thought that we should consider the section, above quoted, as announcing the views of Congress upon this branch of international law, and ought to apply the same rule of decision to a case where a female American citizen marries an alien husband, that we should to a case where an alien woman marries an American citizen.

This subject, as well as the interesting question, whether the removal of a wife, after marriage, to the foreign country of her husband is a prerequisite condition to alienation, is fully and ably discussed in the later decision of *Comitis v. Parkerson et al.*,<sup>1</sup> wherein it is held, to the contrary of the decision in *Pequignot v. City of Detroit*, that the Act Feb. 10, 1855,<sup>2</sup> which provides that an alien woman, by marriage with a citizen, shall become a citizen,—does not authorize any inference that Congress intended to declare the converse, that a citizen woman, by marriage with an alien, should become an alien; nor will the principle that the domicile of the wife is controlled by that of the husband, obviate the necessity of an actual removal from the country of a citizen woman, married to an alien, in order to effect her expatriation, that statute not being a declaration of the general consequences of marriage, but being a furtherance of the uniform policy of the government of the United States to increase immigration by encouraging the naturalization of citizens.

In this case the plaintiff, a native of Louisiana, married a native born subject of Italy, who, prior thereto, had come to Louisiana, and engaged in business without intending to ever return to Italy, though he was not naturalized.

After her marriage, she and her husband, until his death, continued to live there.

In this case it was held that she was not an alien, and hence the Federal courts could have no jurisdiction on the ground of diverse citizenship in a suit by her against a citizen of Louisiana. There do not appear to have been any recent and final decisions by the United States Supreme Court upon these controverted questions.

<sup>1</sup> 56 Fed. Rep. 556.

<sup>2</sup> 10 Stat. 604; Rev. Stat., Sec. 1994.

The executive branch of our government seems to be in advance of the legislative and judicial departments in dealing with such questions. In *Foreign Relations* for the year 1874,<sup>1</sup> we find it held that a woman, a citizen of the United States, married to an alien who resides out of the jurisdiction, absolutely ceases to be an American citizen, and becomes subject to all the disabilities of alienage.

This rule has been modified in some respects by the State Department in regard to rights of inheritance and ability to transfer property. See instructions of Mr. Fish, and Mr. Frelinghuysen to Mr. Lawrence in 1875, and 1883; also to Mr. Foster in 1883, MSS., to the effect that a woman, who is a citizen of the United States, merges her nationality in that of a foreign husband on marriage; but it does not necessarily follow that she thus becomes subject to all disabilities of alienage, such as inability to inherit or transfer real property.

This view is supported in the case of *Beck v. McGillis*,<sup>2</sup> in which it was maintained that marriage of a female with an alien did not render her an alien so as to prevent her taking real estate by dower.

In case of divorce or legal separation of the wife from her foreign husband, foreign practice places her in a position similar to that of a minor child, born of foreign parents, who has been adopted by a citizen of the United States upon reaching majority. The wife may elect whether to pursue the foreign nationality acquired by marriage, or reacquire her former American citizenship. This is the French practice, see article 19 of the civil code, which provides that if she become a widow she shall recover her French nationality, provided she be a resident of France, or return to France with the authorization of the executive, after having declared her intention of permanently residing there. A similar provision is to be found in 33 and 34 Vict.<sup>3</sup> of the British laws. No special provision having been made in the United States for the status of married women, this question remains unsettled.

The absence of a provision on the question in the United

<sup>1</sup> Page 418.

<sup>2</sup> 9 Barb. 86.

<sup>3</sup> C. 14.



States is liable to give rise to a conflict of law; for a Frenchwoman on marrying an American citizen becomes an American, both under the French law and that of the United States. If, however, she becomes a widow while residing in France, by a presumption of the French law, she will be deemed to recover her original nationality. Whether the American courts would admit this presumption of the French law, and recognize that a woman can lose her American nationality by the mere fact of residing in France, at the time of the death of her husband, is undetermined. To re-acquire citizenship lost by her by her marriage, a widow, to avoid uncertainty, should comply with the naturalization laws of her former country.

As long ago as the year 1871, Mr. Fish instructed Mr. Washburn that passports should be withheld from widows of French citizens, former Americans, unless the widows produced evidence of their intent to resume residence in the United States.

Under the old common law an alien woman by marrying a British subject owed allegiance to Great Britain without being entitled to a dower, and this was declared to be the law in the case of *Shanks v. Dupont*.<sup>1</sup>

Although the naturalization acts passed in England and France have tended to mitigate the harshness of the old common law doctrine on this question, it is by no means certain that a widow, who had ceased to be an English subject by presumption of French law, would be entitled to dower in her husband's land.

The complicated questions which would arise on settling the estate of a deceased husband are numberless, depending largely for solution under what law her interests in her husband's estate were to be determined, whether there were a marriage contract, etc.

Under the French law, if the deceased husband has left no relatives within the successional degrees, nor natural children, the surviving wife, not divorced or judicially separated, takes the whole of the estate in fee simple.<sup>2</sup>

In case she is in competition with other heirs, she has only a

<sup>1</sup> *Supra*.

<sup>2</sup> Law of March 9, 1891.

life estate, which is of one quarter of the estate, if there are one or more children of the marriage; of the equivalent of the share of a legitimate child whose portion is the least, in case there are children of a prior marriage; and one-half in all other cases, whatever the number and rank of the heirs.

The surviving wife can only enforce her right upon the property which her predeceased husband has not disposed of by deed *inter vivos*, or by will; she cannot enforce it on the *réserve*, i. e., that portion of the estate to which certain classes of heirs (in the direct line descending or ascending) have a vested right. If, therefore, the testator have exhausted the disposable portion (i. e., the whole of the estate less the *réserve*), the wife is excluded from his estate altogether.

Even then she is not quite destitute, for article 2 of the law modifying article 205 of the Civil Code entitles her to claim alimony from the estate of her deceased husband.

The provisions of this law are reciprocal, and grant the same right to the surviving husband upon the estate of the wife.

The rights of the wife, in general, are so illy defined, and the laws are so conflicting respecting property, that, in case of international marriage, it is advisable to carefully and clearly set out in a marriage contract the intentions of the parties in respect thereto, anticipating the possibilities of a dissolution of the marriage by death, separation and divorce, as well as making provision for the inheritance of future acquisition of property.

. It is to be hoped that, in the near future, the United States will follow the example of other enlightened nations, recognizing in the changed conditions and progress made in the development of international law, the necessity for enacting express legislation defining the status of a woman citizen upon marriage to a foreign subject.

CLIFFORD S. WALTON.

WASHINGTON, D. C.

## EXECUTIVE REGULATIONS.

A regulation of an executive department of the government of the United States, made in conformity to an act of Congress, "becomes a part of the law, and is of as binding force as if incorporated in the body of the act itself."<sup>1</sup> And a regulation made by the President, in the exercise of a constitutional power, also has the force of law.<sup>2</sup> "Of course Congress cannot constitutionally delegate to the President legislative powers; but it may, in conferring powers constitutionally exercisable by him, prescribe, or omit prescribing, special rules of their administration, or may specially authorize him to make the rules. When Congress neither prescribes them, nor expressly authorizes him to make them, he has the authority, inherent in the powers conferred, of making regulations necessarily incidental to their exercise, and of choosing between legitimate alternative modes of their exercise."<sup>3</sup>

Considering the enormous mass of executive regulation law by which the administration of the Federal government is controlled, it is evident that the subject is one of the greatest importance. A few thoughts with reference to it will be submitted.

There is an important distinction which should be kept in mind in this connection, namely, the distinction between offices created by statute and those created by the constitution. As to the former, the extent of their authority and the manner of its exercise are subject to the control of the legislative branch; but as to an office created by the constitution, and whose general powers are named in it, and which is not by the constitution made dependent on legislation for its jurisdiction, its authority can not, as to these constitutional powers, be thus controlled,

<sup>1</sup> U. S. v. Barrows, 24 Fed. Cas. 1018.

authorities cited in Winthrop's Mil. Law, Vol. I, p. 20, n. 2.

<sup>2</sup> Gratiot v. U. S., 4 How. 118; and

<sup>3</sup> 2 Phillad. 269.

except in so far as the legislative branch may refuse to vote the means or furnish the opportunity necessary for their exercise, or unless the constitution itself vests the legislative branch with a superior authority as to some subject-matter over which both it and the executive or judicial branch have jurisdiction. When Congress, by its exercise of the legislative power, creates new subjects of political action, it may, for the execution of the laws relating to them, vest the President with new powers; but where the President is vested with a distinct power by the constitution, Congress can not control it otherwise than as indicated.<sup>1</sup>

In the *Neagle* case the United States Circuit Court<sup>2</sup> said: "The power and duty imposed on the President to 'take care that the laws are faithfully executed,' necessarily carries with it all power and authority necessary to accomplish the object sought to be attained." And on the appeal of this case the Supreme Court<sup>3</sup> said: "The constitution<sup>4</sup> declares that the President 'shall take care that the laws be faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States,

<sup>1</sup> "The theory of the constitution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond that, all are subject to regulations by law, touching the discharge of the duties required to be performed.

"The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we

apprehend, is not, and certainly can not be claimed by the President.

"There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character." *Kendall v. United States*, 12 Pet. 610.

<sup>2</sup> 39 Fed. Rep. 888.

<sup>3</sup> 135 U. S. 63.

<sup>4</sup> Sec. 3, Art. 2.

and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'

"Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution?"

And the court, Mr. Justice Miller delivering the opinion, then give a number of examples of proper occasions for the exercise of this executive power, and conclude that, while there is no express statute authorizing the appointment of a deputy marshal, or any other officer to attend a judge of the Supreme Court when traveling in his circuit, and to protect him against assaults or other injury, the general obligation imposed upon the President of the United States by the constitution to take care that the laws are faithfully executed, and the means placed in his hands, both by the constitution and the laws of the United States, to enable him to do this, impose upon the executive department the duty of protecting a justice or judge of any of the courts of the United States, when there is just reason to believe that he will be in personal danger while executing the duties of his office.

In *Wilcox v. Jackson*,<sup>1</sup> the Supreme Court held that the Presi-

<sup>1</sup> 18 Pet. 498.

dent could legally set aside public lands for a military post or Indian agency, in the execution of laws authorizing him to establish them at such places as he might deem best, but not expressly authorizing him to reserve public lands. And in *Grisar v. McDowell*,<sup>1</sup> the same court call attention to the fact that from an early period in the history of the government it had been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses, his authority in this respect being recognized in numerous acts of Congress. Thus, in the Pre-emption Act of May 29, 1830, it was provided that the right of pre-emption contemplated by the act should not "extend to any land which is reserved from sale by act of Congress, or *by order of the President*, or which may have been appropriated for any purpose whatever." Again, in the Pre-emption Act of September 14, 1841, "lands included in any reservation by any treaty, law, or *proclamation of the President*, or reserved for salines or other purpose," were exempted from entry. So by an act of March 3, 1853, it was declared that all public lands in California should be subject to pre-emption, and offered at public sale, with the exception, among others, "of lands *reserved by competent authority*," and the court say that by "competent authority" was meant the authority of the President and officers acting under his direction. As to the reservations then in question the court say that they were indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them. And in the case of *Swaim v. United States*,<sup>2</sup> it has been finally settled that the President, as commander-in-chief, has the constitutional power to convene courts-martial — a striking illustration of an undefined constitutional power, for it is nothing less than the power to constitute tribunals with judicial jurisdiction extending even to trials for capital offences.

The President, said Mr. Cushing, "is limited in the exercise of his powers by the constitution and the laws; but it does not

<sup>1</sup> 6 Wall. 381.

<sup>2</sup> 165 U. S. 558.

follow that he must show a statutable provision for everything he does. The government could not be administered upon such a contracted principle. The great outlines of the movements of the executive may be marked out, and limitations imposed upon the exercise of his powers, yet there are numberless things which must be done, which cannot be anticipated and defined, and are essential to useful and healthy action of government.”<sup>1</sup>

Regulations made pursuant to and in aid of statutes are very common.<sup>2</sup> In the case of the *United States v. Breen*,<sup>3</sup> the constitutionality of such regulations, made pursuant to legislation declaring any violation of them a misdemeanor and punishable by fine and imprisonment, was fully recognized. In that case Mr. Justice Lamar said:—

“The only ground relied upon in behalf of the defendant is, that the authority conferred by the act of Congress on the Secretary of War to make and promulgate said rules and regulations is legislative, and cannot, under the constitution of the United States, be, by act of Congress, conferred upon the Secretary of War, or anyone else, so as to make a violation thereof a crime against the United States. Whether this is so or not is the only question to be determined.

<sup>1</sup> 6 Opín. Atty Gen. 10, 365; 8 *Id.* 343; 10 *Id.* 413. In *U. S. v. Macdaniel* (7 Pet. 14), the Supreme Court said: “A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for every thing he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its move-

ments may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future.”

<sup>2</sup> See title “Regulations,” in the index of the Revised Statutes; and see the opinion of Mr. J. M. Dickinson, acting Attorney-General, dated October 24, 1896.

<sup>3</sup> 40 Federal Reporter, 402.

“ If the law empowered the Secretary of War, by rule or regulation, to make a certain act criminal, and punishable as such, then this prosecution would not be maintainable; but it is not the rule and regulation which declares the violation thereof a crime, and punishable. All that the Secretary is authorized to do is to make the rule and regulation. It is the act of Congress which declares that the unlawful and willful violation of such rule and regulation, after it is promulgated, shall be held a misdemeanor by the person violating the same, and that such person shall be sentenced to pay a fine not exceeding \$500, and shall suffer imprisonment not exceeding six months, as a penalty therefor. Numerous acts of Congress have been passed authorizing the Postmaster-General and other members of the executive department, to make rules and regulations for the business pertaining to their respective departments, and declaring that, when made and promulgated, a willful and unlawful violation of them should be held a crime against the United States, and the violators punished as prescribed in the act. The Supreme Court of the United States is authorized by act of Congress to adopt certain rules for the government of the inferior courts, which, when made, have the force and effect of law as much as if such rules were directly enacted by Congress, and approved by the President. The same effect is to be given to the rule and regulation made by the Secretary in this case. The act of Congress denounces the violation of it as a crime, and prescribes the penalty. The criminality of the violation of the rule, and the liability of the offender to indictment and to punishment upon trial and conviction, result directly and exclusively from the legislation of Congress.”<sup>1</sup>

<sup>1</sup> In *Woods v. Gary*, Mr. Justice Cox, of the Supreme Court of the District of Columbia, said:—

“ If an act of Congress, presumed to be approved by the President, vests in the judges or heads of the departments authority to appoint subordinate officers, then, by constitutional authority, the power to appoint them is taken away from the President; and it fol-

lows, according to this case, that the power of removal would be equally taken away. The President might dismiss the head of a department who would refuse at his request to dismiss a subordinate or inferior officer, but would have no power directly to dismiss such officer himself.

“ It may be regarded, then, as the settled law that the power of removal



But it is not necessary to give further examples of regulations made pursuant to and in aid of statutes. They are to be met with throughout our political system, and are a necessary part of its machinery.<sup>1</sup>

is incident to the power of appointment, and, therefore, that any law which confers upon the head of a department a power of appointment, *ipso facto*, conveys a power of removal, as effectually as if that power were expressly given by the statute. The power of removal is intrenched in the law. It is created by an act of legislation, and it can only be taken away or modified by similar authority. The acts of Congress, therefore, authorizing the appointment of complainant as inspector of mails of themselves gave the postmaster general authority to remove him at pleasure, unless that or some other act of Congress has imposed some limitation, condition or restriction upon that power.

"And this brings us to the inquiry whether and how far, if at all, the act of January 16, 1888, commonly known as the civil service act, affects the power of removal at pleasure which

the Postmaster-General would possess under his general authority to appoint this class of officers. It does, indeed, very materially modify the power of appointment theretofore existing, but it does not purport to affect the power of removal, except in a single particular.

"In section 13 it provides that: 'No officer or employé of the United States mentioned in this act shall discharge or promote or degrade, or in any manner change the official rank or compensation of any other officer or employé, or promise or threaten to do so, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.'

"Substantially the same is directed to be provided by rules, to be established by the commission and the President, in clause 3 of the second section. In no other single respect is

<sup>1</sup> It would require too much space to enumerate all the statutory provisions of this class down to the present time, in which "regulations," as such, are authorized to be prescribed. For the principal of those enacted prior to 1886, reference may be had to the first edition of this work, pages 18-19, note 3. Repeated instances also occur in the statutes where, though the word "regulations" is not employed, the same meaning is conveyed by some equivalent term or expression; as by the term "directions," "instructions," "forms," "requirements," "restrictions," "conditions," "limitations," "by-laws." Not unfrequently a thing is required by the

statute to be done in such manner, etc., as a head of a department, etc., "may prescribe." The "Regulations for the Government of the Revenue Cutter Service of the United States," issued by the Secretary of the Treasury, April 4, 1894, and resting on no authority more express than is found in the terms of Secs. 2758 and 2762 placing this corps (consisting of the officers and crews of thirty-six vessels) under the general direction of the secretary, is a striking illustration of the discretion exercised by heads of departments in making regulations as to matters of detail. (Winthrop's Military Law and Precedents, page 18.)

The power to make regulations is not, indeed, confined to political bodies or officers. It enters into other relations of life — wherever, in fact, *government* is necessary. Thus corpora-

the power of removal affected by any substantive and direct enactment of this law.

“But it is claimed that the commission is empowered to prepare rules in aid of the President for carrying this act into effect, and that said rules, when prepared and promulgated, have the force and effect of law, and that such effect is to be given to the rules under which the complainant seeks relief.

“There can be no doubt as to the power of Congress or any other legislative body to delegate to subordinate authorities the power to make rules and regulations within certain limits, which, when made, will have the force of law. Thus, corporations, municipal or private, may be authorized to make by-laws, and police commissioners, boards of health and fire commissioners may be authorized to make regulations which have the effect of laws.

“But if any rule prepared by this commission, whether published by the President or not, should have the effect of repealing or modifying an act of Congress, it would be an act of legislation, and not a regulation of a mere executive character, which it was clearly the object of this law to authorize. It is a grave question whether Congress could delegate to the President, or to any board of commissioners, jointly with the President, the authority to do any act which is equivalent to legislation.

“I am not aware that the Supreme Court has made any delivery upon this question, but there is a uniform current of authorities in the State courts against the power of any legislature so to delegate their authority. See the

authorities collected in the American and English Encyclopædia of Law, vol. 3, p. 698, under the proposition:

“‘It is an established proposition of constitutional law that the power conferred upon the legislature to enact laws cannot be delegated by that department to any other body or authority.’

“One illustration was the case of a statute of Minnesota which left it to certain judges to decide whether a law should be submitted to the people (State agt. Young, 29 Minn. 474), and another was a law which conferred upon the district court the power to incorporate towns — People agt. Nevada, 6 Cal. 148; State agt. Simons, 82 Minn. 540 — both of which forms of legislation were held unconstitutional.

“But probably all courts would agree that no law is to be construed so as to amount to a delegation of legislative authority that can be avoided. An illustration of this rule is found in the case of *Interstate Commerce Commission v. Railway Company*, 167 U. S. 479. The interstate commerce act required that all charges on railroads should be reasonable and just, and every other was declared to be unlawful. It prohibited discrimination, undue preferences, etc. It created the interstate commerce commission, gave it authority to inquire into the management and business of all common carriers and added: ‘And the commission is hereby authorized to execute and enforce the provisions of this act.’

“Under this authority the interstate commerce commission undertook by an order to establish a schedule of rates for certain railroad companies,

tions possess the power of making regulations, including by-laws. Social clubs have the power, and their regulations are recognized by the courts as binding. We here speak of by-laws as regula-

and, upon the refusal of the latter to observe them, applied to the Circuit Court for the southern district of Ohio for a mandamus to enforce their order, and, this being refused, appealed to the Court of Appeals, and the latter court certified to the Supreme Court of the United States the question whether the commission had the jurisdictional power to make the order before mentioned. Justice Brewer in delivering the opinion of the court in the negative, said, in construing the act of Congress: 'The power given is the power to execute and enforce, not to legislate. The power is partly judicial, partly executive and administrative, but not legislative.'

"Again:—

"We have, therefore, these considerations presented: First, the power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousand of miles of road and the millions of tons of freight carried, the varying and diverse conditions attached to such carriage is a power of supreme delicacy and importance. Second, that Congress has transferred such power to any administrative body, is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used; and if Congress had intended to grant such power to the interstate commerce commission it cannot be doubted that it would have used lan-

guage open to no misconstruction, but clear and direct. Third, incorporating into a statute a common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act does not, by implication, carry to the commission or invest it with the power to exercise the legislative functions of prescribing rates which shall control in the future.'

"And so, with equal emphasis, it may be said that the authority to the civil service commission to aid the President in preparing rules for carrying the act creating that commission into effect, does not by implication confer upon the President a right to virtually repeal an existing law, especially when, as we shall see, that is not at all necessary to the effectual operation of the act itself. And lastly, there is nothing in the language of the act or the objects which it professes to attain which makes it necessary to attribute such executive power to the commission or the President. The act nowhere requires that the power of removal vested in the head of a department shall be abridged except in the single particular of removal, because of the refusal to contribute for partisan purposes; and therefore it is not necessary, in order to carry the act into effect, that any rule should be adopted abridging the power of removal of the Postmaster-General or other head of a department in any other respect.

"The second section contains an enumeration of the objects for which the rules are to provide. They are: For competitive examination, for ap-

tions. In one sense a distinction has been made between them in the law of corporations, the by-law being held to be more usually established for the government of the internal

pointment by selection from those grades highest as the result of such examinations, for apportionment of the appointments among the States and Territories and the District of Columbia, according to population, for a period of probation before absolute appointment, for exemption of persons in the public service from any obligation to contribute to any political fund and from being coerced into any political action, and for non-competitive examination in certain cases, and for notice to the commission of all appointments made by the appointing power.

"It would be a very irrational interpretation which would give to the words 'and among other things,' which are prefixed to this enumeration such a scope of meaning as to convey by implication an unlimited authority to establish rules having no relation to the objects of the law. If that were a proper interpretation of the law, these rules might be made to impose new conditions to the power of appointment, and even take it away from the heads of the departments and vest it in the commission itself. The absurdity of such a proceeding would be manifest, and yet it would be no more obnoxious to criticism than rules modifying the power of removal, as it existed before the act was passed, or in a manner not warranted by the law itself.

"The law seems to contemplate the preparation of these rules as the joint act of the commission and the President. It directs that when promulgated they shall be observed by all the officers in the departments. It does not in terms declare by whose author-

ity they are to be promulgated and to go into effect, but it is to be presumed that it is to be by the President. It makes no difference, however, whether they are to emanate from the President or the commission, for Congress is just as incapable of surrendering its legislative authority to the President as to the commission; and is just as little to be understood as intending to do so in the one case as in the other. The simple inquiry is whether the rules invoked by the complainant, whether the President or the commission, or both, be the authors of them, are such as the act of January 16, 1888, known as the civil service act, authorized to be established. In my judgment they are *ultra vires* and void.

"I have no doubt that the President may lay down rules for the internal policy of his administration, and may require his chief executive officers, dependent upon his pleasures for their tenure of office, to conform to them, or else to sever their official relations with him, and in that sense the rules relied on by the complainant were within his political and executive authority. But the enforcement of such rules is a matter between the President and his Cabinet, and not a matter for the courts, or one in which the complainant has any legal interest. All that I mean to state in this opinion is that the rules in question were not such as the civil service act authorizes, and do not derive any efficacy from that act.

"I know of nothing more important to the true interests of the country than the policy which the civil service legislation was intended to initiate and promote, and it is perhaps a mat-

affairs of the corporation, while the regulation is regarded as intended for the government of its business with the public.<sup>1</sup> But the word *regulation* is here used in a broader sense and as including the by-law.

In the case of *Yturbide v. The Metropolitan Club*, the Court of Appeals of the District of Columbia, said:—

“There is no longer any question of the right of a corporation, such as that of the respondent in this case, to make by-laws, even in the absence of express statutory power, and to exercise the power of amotion, as incident to the corporation. This has been regarded as the settled law since the case of *Lord Bruce*,<sup>2</sup> and the subsequent exposition of the whole doctrine in the case of *Rex v. Richardson*,<sup>3</sup> by Lord Mansfield, speaking for the court of King’s Bench in 1758. In this last mentioned case, after reviewing the former decisions and the previous doctrine upon the subject, and showing that the older cases had maintained a doctrine that had been modified by the more recent cases, the Lord Chief Justice said: ‘We all think this modern opinion is right. It is *necessary* to the good order and government of corporate bodies, that there should be such a power (that of amotion), as much as the power to make by-laws. Lord Coke says,<sup>4</sup> “there is a tacit condition annexed to the franchise which, if he breaks, he may be disfranchised.” But where the offence is merely against his duty as a corporator, he can only be tried for it by the corporation. Unless the power is *incident*, franchises or offices might be forfeited for offences, and yet there would be no means to carry the law into execution.

ter for great regret that the act of January 16, 1883, has not gone further than it does. But it is my duty to construe it as it is.

“To sum up, I conclude that, apart from the civil service act, the post-master general had the authority to remove the complainant from office at his pleasure; that this act makes no change in this respect, except to forbid removals for refusal to contribute to partisan objects; that the power to the commission and the President to

establish rules to carry that act into effect does not authorize any rule which shall make a change in the law in this respect, and that even if this court had jurisdiction in a case like the present, the complainant is not entitled to the relief prayed.”

<sup>1</sup> Thompson on Corporations, Section 987.

<sup>2</sup> 2 Strange, 819.

<sup>3</sup> 1 Burr. 517, 539.

<sup>4</sup> *Bagg’s Case*, 11 Co. 98a.

Suppose a by-law made to give power of amotion for just cause, such a by-law would be good. If so, a corporation, by virtue of an incidental power, may raise to themselves authority to remove for just cause, though not expressly given by charter or prescription.' The doctrine of that celebrated case has never been questioned from the time it was announced, and it is the law, both in England and in this country, at the present day." <sup>1</sup>

Regulations made pursuant to statute may, in general, be modified, but exceptions to them in individual cases can not legally be made.<sup>2</sup> There is, however, a difference to be observed in this respect between general regulations and specific acts. Ordinarily when an executive officer is empowered by law to do one specific act, as, for example, to reserve public land for a specific public use, his doing this act exhausts his power as to the subject-matter. So, where he is empowered to do a specific

<sup>1</sup> *Com. v. St. Patrick Ben. Soc.*, 2 Binn. 448, 449; 2 Kent Com. 297.

<sup>2</sup> This is illustrated by the following newspaper comments (1897):—

"The appointment of General Tyner to be assistant attorney-general for the Post Office Department has been criticised by some as a violation of the civil service law, in that the place being under the Post Office Department was included within the classified service by an order of President Cleveland.

"Civil Service Commissioner Proctor to-day stated that when President Cleveland ordered the classification of the Post Office Department it was not supposed that the place of assistant-attorney-general for that department was within the scope of that order. When it was found that such was the case the matter was brought to the attention of President McKinley, who excepted the place, allowing the appointment to be made without examination by the civil service commission.

"The announcement that the President had excepted this place after it had been included in the classified service, even if such classification was the result of a mistake, has created surprise, as the commission has contended that when once a place was included in the classified service by order of the President, under authority of the civil service law, such action had the force of law and could not be rescinded except by act of Congress.

"At the office of the civil service commission to-day it was stated that this view of the effect of once including a place in the classified service was the accepted opinion of the commission, but it was not generally understood that the President still retained the power to 'except' any place from examination and to make the appointment without the intervention of the commission, the place still being in the classified service, the only restriction placed upon such power being the provision that he could make 'necessary' exceptions."

set of acts. But when he is given a general discretionary power to make regulations in aid of a law, the power to modify regulations once made is included in it.

A distinction should however be made between essential regulations made in aid of a statute, such as are necessary to the execution of the statute and thus have the appearance of being of a decidedly legislative character, and regulations which are merely supplemental to these and relate to the minor details of the machinery for the execution of the statute. These are, to be sure, made in aid of it also, but are not of the character referred to. It is, however, impossible to lay down any rule which would enable us, at a glance, to distinguish in every case the one from the other. There is not always a clear-cut line of demarcation. The distinction exists, but its application must be controlled by the facts of each case.

The Judge-Advocate General's office has applied the principle of the binding character of regulations made pursuant to and in aid of statutes to regulations made for the disbursement of an appropriation, holding that when Congress makes an appropriation, but leaves it to the executive to prescribe regulations for its disbursement, such regulations should be regarded as made in aid of a statute (although not actually pursuant to it), and therefore as falling under the rule that they are binding on the authority who made them as well as on others, and that they may be modified, but that individual exceptions to them can not be made. And the action of the War Department is understood to have been a confirmation of this view. The regulations in question related to the expenditure for the transportation of deceased soldiers to the place of burial. Another example of a regulation of this kind is that fixing the fees of civilian witnesses before courts-martial, for, although in deference to the views of the comptroller of the treasury these fees have been made to conform to those of witnesses before the Federal courts, as regulated by the Revised Statutes, this regulation is none the less an exercise of the executive power in aid of an appropriation, and has no dependence on the statute with which it has been made to conform. And another example of such a regulation was that by which the reward for the apprehension of deserters was

regulated before Congress was induced to take to itself the determination of the amount of the reward.

It is said that regulations made under a statute may be referred to as a practical interpretation of the statute.<sup>1</sup> In executing the laws it is often necessary for executive officers to interpret and construe them, and this may be done by means of regulations. Such regulations are valid and binding, unless declared by the courts to be erroneous interpretations of the law. Each new tariff act, for example, necessitates many such regulations, and we have a good illustration of this in the Treasury Circular of September 4th, 1897, with reference to the entry of personal effects under the act of July 24, 1897. In this circular we find the following definition of the phrase, "residents of the United States returning from abroad," as it occurs in the Act:—

"The proviso in paragraph 697 contains special provisions and limitations concerning residents of the United States returning from abroad. It therefore becomes necessary to define the term 'residents of the United States returning from abroad,' in order that customs officers may have a reasonable guide in the practical application of the proviso. The word 'resident' has, in law, more than one meaning, much depending upon the connection and purpose in which it is used. As used in this proviso to paragraph 697, it is held by the department to include all persons leaving the United States and making a journey abroad, and, during their absence, having no fixed place of abode. Persons who have been abroad two years or more, and who have had, during that time, a fixed place of abode for one year or more, will be considered as non-residents within the meaning of this law."

And so it is in all the executive departments. In making regulations to carry out a statute it is often necessary to place some express interpretation on it; and this interpretation holds good until judicially reversed. But, of course, great care should be taken to avoid strained interpretations.

Many systems of regulations for the transaction of the business of different branches of the government have been issued,

<sup>1</sup> U. S. v. Cottingham, 1 Rob. (Va.) 685; Winthrop, 19, n.



such as the postal, patent office, pension office, land office, Indian office, civil service, customs, internal revenue, revenue cutter service,<sup>1</sup> and other treasury regulations, consular regulations, army and navy regulations, etc. But these systems of regulations, as they are here called, form by no means the whole of that mass of regulation law which constitutes so large and important a part of our administrative law. All regulations are not collected together in systems or groups, but an enormous mass of them consists of individual regulations, the knowledge of whose existence even is ordinarily limited to the few who have to apply them to the subjects to which they relate.

It is difficult to form a true conception of the vastness and importance of all this great body of executive regulation law, controlling as it does the administration of all the executive departments with its rules of action. And when we consider that these rules of action are in general made, construed, and applied by the same authority, thus combining quasi-legislative, quasi-judicial, and executive action, we cannot fail to be very much impressed with the extent of the jurisdiction covered by this executive power of making regulations. The subject is one of unlimited interest.

G. NORMAN LIEBER.

WASHINGTON, D. C.

<sup>1</sup> The regulations for the government of the Revenue Cutter Service are in one respect unique; they establish a complete penal system, including a code of penalties and a system

of procedure. No other regulations have ever undertaken to go to this extreme, and it may well be doubted whether the executive power can legally be carried so far.

## THE ALLUREMENT OF INFANTS.

It was early decided in England<sup>1</sup> that a man, with design to lure and destroy neighboring dogs, had no right to set traps in his own wood, near a highway and the grounds of the plaintiff, and place pieces of flesh anointed with anisseed about the traps, attractive to the canine race by reason of their scent. Ellenborough said there was no difference between "drawing the animal into his trap by means of an instinct which he cannot resist and putting him there by manual force." But this was a case of malice. Where a necessity exists for doing an act which is naturally calculated to entice animals into a dangerous position, the act is excused. So a railroad company is not liable for the death of cattle attracted to a station by the scent of hay loaded on its cars, and there killed by a train, provided the cars were not allowed to stand an unreasonable time;<sup>2</sup> and the same was held in respect to cars loaded with corn;<sup>3</sup> and in respect to salt sprinkled on the track to melt snow.<sup>4</sup> Brute instincts must yield to human necessities. If carelessness, however, had entered into the circumstances, as where the railroad company had negligently spilled salt on the ground in the act of unloading cars, the result would have been different;<sup>5</sup> and so in respect to an accumulation of cotton on and about the track.<sup>6</sup>

This doctrine of attraction has been very frequently applied in modern times in the case of infants. The law makes more or less allowance for the curiosity, restlessness and adventurous spirit of young boys, eager, like the Greeks of St. Paul's time, "to see or hear some new thing." The small boy always loves to "catch a ride" in any direction, up or down or straight

<sup>1</sup> *Townsend v. Wathen*, 9 East, 277.

<sup>4</sup> *Kirk v. Norfolk & C. R. Co.*, 41 W.

<sup>2</sup> *Schooling v. St. Louis & C. R. Co.*, 75 Mo. 518.

Va. 522; 56 Am. St. Rep. 899.

<sup>3</sup> *Crafton v. Hannibal & St. Jo. R.*

<sup>5</sup> *Gilliland v. Chicago & C. Ry. Co.*, 19 Mo. App. 511.

Co., 55 Mo. 580.

<sup>6</sup> *Railway v. Dick*, 52 Ark. 402.

ahead or around, and so he is prone to catch at the tail of a passing cart, or at a balloon rope, or to venture on an elevator or a turntable or a merry-go-round; and to climb, slide and dig. In the same manner, like Mr. Robert Kidd, of piratical memory, he loves to sail, and if he can lay hold of an unlocked boat or paddle on a plank in a pond he is happy. He loves to explore all sorts of depressions in the ground like caves, and when like Saxe's "Briefless Barrister," "he espies a deep hole in the ground," like him "he sighs to himself, it is well." Those philosophers and mechanics, who for centuries have been seeking to realize the possibility of perpetual motion, seemed to have overlooked the small boy. He should prove a reasonable solution of the problem.

Now, boys are just as God has made them, and as God has not seen fit to make them careful, cautious, reasonable, and reflective, most courts have deemed it wise and humane, in order to protect the breed and guarantee it against extermination and save it from unsightly disfigurements and inconvenient maimings, to make certain allowances for them and their notorious proclivities, and exact from adults a certain extraordinary degree of foresight and care in view of them. This branch of the law has grown to considerable dimensions and is peculiarly full of interest, especially when the differing views of courts on the subject are regarded. Somebody has said in effect that the measure of equity was the chancellor's foot, and of this subject it may be said that it is regulated to a large degree by the size of the judicial heart. Some courts are very humane, almost foolishly so; while others seem to be constituted of unmarried or childless men — courts of Barons, so to speak.

Therefore many courts have adjudged that it is wrong to maintain dangerous things easily accessible to adventurous youth, certainly where they have a right to be, as on the public highway, and even on private premises near the traveled ways, so that infants in meddling with them are technically trespassers.

Not to essay a citation of all these cases, nor to consider the general doctrine of the contributory negligence of infants, it may be useful to recall the leading adjudications on the doctrine

of alluring negligence, and to note the growth and present tendency of judicial opinion on the subject.

The leading English case, *Lynch v. Nurdin*,<sup>1</sup> was an exceedingly humane decision. The defendant's horse and cart were left standing unattended in a street where a number of children were playing; the plaintiff, under seven, climbed upon a wheel, another boy led the horse forward a step or two, and the plaintiff fell off and was hurt. The court held that he could recover damages. On the other hand, in *Hughes v. Macfie*,<sup>2</sup> the court held that children of five and seven could not be tolerated in jumping on the covering of a bulkhead left tilted up against a wall on a highway. "His touching the flap was for no lawful purpose," said Pollock, C. B. In *Mangan v. Atterton*,<sup>3</sup> the same was held of a boy of four, who, by direction of his brother of seven, put his fingers into the cogs of a machine, left exposed for sale, unfenced and unattended, in a public street. The court said it was as if the child had sucked goods covered with poisonous paint, and suggested that if the child had hurt the machine he would have been liable. Mr. Beach well says: <sup>4</sup> "Nothing worse than this, as a specimen of judicial reasoning, can be found in the reports;" and Cockburn, C. J., pointedly condemned it,<sup>5</sup> pronouncing the defendant's conduct "negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief," etc. These cases seem to leave the scales pretty evenly balanced in England. In a later English case,<sup>6</sup> the complaint was made of a schoolmaster for carelessly allowing phosphorus to be accessible to the school children. One of the boys, not plaintiff, put a lighted match into the bottle — "there came a burst of thunder loud — the boy! — oh! where was he?" It was left to the jury to say, and they said £75 damages. Boys seeking for light are viewed with indulgence.

The doctrine of *Lynch v. Nurdin* has been generally followed in this country. It is however rejected in Massachusetts. In

<sup>1</sup> 1 Q. B. 29.

<sup>2</sup> 2 Hurl. & Colt. 744.

<sup>3</sup> L. R. 1 Exch. 289.

<sup>4</sup> 2 Cont. Neg., § 139.

<sup>5</sup> *Clark v. Chambers*, 3 Q. B. Div. 327.

<sup>6</sup> *Williams v. Early*, 9 Times L. R. 637.

*Lane v. Atlantic Works*,<sup>1</sup> an infant of seven, playing about a truck standing in front of a foundry, and injured by a heavy casting which rolled off the truck, owing to the action of a boy of twelve, was held to have no cause of action. There is not much consideration of the point of contributory negligence. The same court made the same ruling in respect to street cars left in the street;<sup>2</sup> "knowledge on the defendant's part that they attracted children was not an invitation or license to them."

The foregoing were all cases of exposure of dangerous things in the public highway, where the children had a right to be, and therefore (except *Lynch v. Nurdin*) seem much less defensible than decisions of the same purport where the children were trespassers on private land, where the owner might not so reasonably be held to expect or foresee their intrusion. The doctrine of *Lynch v. Nurdin* in cases of exposure in the highway has been pretty uniformly adopted in this country, the Massachusetts court being the chief exception. New Hampshire, however, gives some countenance to the Massachusetts doctrine in *Clark v. Manchester*.<sup>3</sup> The defendant city had maintained a public reservoir, but abandoned it and was engaged in filling it with earth, without inclosure or guard, which process attracted children there, and several boys had fallen into the water. There was a neighboring public sporting field, and the small boy in question, attracted thither by the joint seductions of ball playing and music, fell into the reservoir and untimely perished. His little "moist, unpleasant body" did not appeal to the granite-hearted court, who observed: "It was the ordinary case of a land-owner, managing, within the boundaries of his own land, his own property in his own way for his own use and benefit; and though in doing this he might find occasion to dig excavations, construct reservoirs, provide fish ponds, plant and cultivate fruit-trees, erect and maintain useful structures, and machinery, all of which are alluring, attractive and dangerous to children, yet it could not be claimed that he must constantly guard these things against the approach

<sup>1</sup> 107 Mass. 104; 111 *Ibid.* 186.

<sup>2</sup> 62 N. H. 577

<sup>3</sup> *Gay v. Essex Elec. &c. R. Co.*, 159 Mass. 288; 21 L. R. A. 449.

of persons coming without license or invitation, and attracted by mere curiosity or pleasure, or suffer in damages for any injury they might receive." In contrast to this is the judgment in *Indianapolis v. Emmelman*,<sup>1</sup> where the city had made an excavation in the bed of a shallow stream at the crossing of a street, and left it unguarded, with knowledge that children were in the habit of playing in the vicinity. This case strongly recognizes the doctrine of allurement; and so does *City of Pekin v. McMahon*,<sup>2</sup> where the city maintained on its own land, near a driveway across vacant lots, and only partially inclosed from the side streets, a deep pond, with logs and timber floating therein, on which children were in the habit of playing. This case gives a very full citation of the authorities *pro* and *con*. The court said: "The love of motion, which attracts a child to play upon a revolving turntable, will also attract him to experiments with a floating plank or log which he finds in a pond within his easy reach." The like was held of an excavation made by a city on property under its control, naturally inviting an infant to the brink of a precipice,<sup>3</sup> the court placing the liability upon the ground that "what was done was reasonably calculated to entice a child, following its instincts of curiosity or love of liberty." And so it was held of a child of ten taking hold of a "live wire" in the street: <sup>4</sup> "His conduct must be judged with due regard for his boyish nature and habits," said the court. And so of a child fooling with a heavy iron roller with mules attached, left in the public street, unfastened and unattended.<sup>5</sup>

The case of *Meibus v. Dodge*,<sup>6</sup> may be ranked as a case of attraction, although the recovery was not put on that ground. The defendant left his dog, which he knew to be vicious, unmuzzled, in his sleigh in the street. The plaintiff, a boy of seven, was attracted by the whip (what boy can resist a whip?) and meddled with it, and the dog bit him. "It was where children would naturally be passing and playing," said the

<sup>1</sup> 108 Ind. 530; 58 Am. Rep. 65.

<sup>2</sup> 154 Ill. 141; 27 L. R. A. 206.

<sup>3</sup> *Mackey v. City of Vicksburg*, 64 Miss. 777.

<sup>4</sup> *Haynes v. Raleigh Gas Co*, 114 N. C. 203; 41 Am. St. Rep. 786.

<sup>5</sup> *Westerfield v. Levi*, 43 La. Ann. 63.

<sup>6</sup> 38 Wis. 300; 20 Am. Rep. 6.

court: "children playing in the street are entitled to consideration."

In *Fitzpatrick v. Garrison's &c. Ferry Co.*,<sup>1</sup> boys gathered out of curiosity on the bridge of a ferry dock, bringing it down with such force as to pull out a fastening and cause a weight to fall on one of them and injure him. The defendant was held liable.

In a recent case the defendant maintained a windmill, in a public street, unguarded and its cogwheels and gearing exposed, and a child meddled with it to his injury. A recovery was sustained.<sup>2</sup>

A boy going on a public dumping ground to get some wire cannot maintain an action for having his bare feet scorched by smouldering fire.<sup>3</sup>

When we come off the highway or other public grounds, where infants have a right to be, and come upon private lands, we meet the extended doctrine, that if the owner maintains anything thereon near the highway, or in the vicinity of which he permits the public to go, which is in its nature alluring to children, and to which he has reason to know that they resort, and which is dangerous to children, because unguarded, he is liable for any accident resulting therefrom. The chief class of cases illustrative of this principle is the turntable cases in which the courts of this country are now pretty evenly divided in opinion, according to authority, if not according to number. Viewing with tenderness the boyish propensity to ride on a convenient and unlocked turntable we find the courts of the United States, Kansas, Minnesota, Missouri, Nebraska, Texas and California.<sup>4</sup> While frowning on this boyish intrusion on corporate rights are

<sup>1</sup> 49 Hun, 288.

<sup>2</sup> *Gahagan v. Aerometer Co.* (Minn.), 1 Am. Neg. Cases, 92.

<sup>3</sup> *Butz v. Cavanaugh* (Mo.), 1 Am. Neg. Cases, 399.

<sup>4</sup> *Railroad Co. v. Stout*, 17 Wall. 675; *Kansas City Ry. Co. v. Fitzsimmons*, 22 Kans. 686; 31 Am. Rep. 208; *Keffe v. Mo. & St. P. Ry. Co.*, 21 Minn. 207; 18 Am. Rep. 398; *Illwaco R. & N. Co. v. Hedrick*, 6 Wash. 446; *Nagle*

*v. Mo. P. Ry. Co.*, 75 Mo. 653; 42 Am. Rep. 418; *Evansich v. Ry. Co.*, 57 Tex. 126; 44 Am. Rep. 586; *Railroad Co. v. Bailey*, 11 Neb. 383; *Callahan v. Eel River &c. R. Co.*, 91 Cal. 296; *Fort Worth &c. R. Co. v. Robertson*, Tex. ; 14 L. R. A. 781; *Bridger v. Ry. Co.*, 25 S. C. 24; *Ferguson v. Columbus &c. R. Ry.*, 75 Ga. 637; 77 *Ibid.* 103 (a little girl in this case).

those of Massachusetts, New York, Illinois and New Hampshire.<sup>1</sup> Some of these decisions were influenced in some measure by the nearness of the dangerous object to the highway, but judges and common men should remember that a turntable is a very potent magnet to draw small boys off the street, and should govern themselves accordingly. In all such circumstances the question is not so much what boys ought to do, as what they are accustomed to do. I do not find that any of our courts has been so imaginative as to suggest, like the court in *Mangam v. Ather-ton*, that the intrusive boy might be cast in damages if he deranged the machinery of the turntable. In two of the courts upholding the doctrine of tenderness toward the revolving infant, it has been more recently held that if the railroad company fasten the machine in the ordinary way, and the capable infant unfastens it, puts the table in motion, and so is hurt, the company is not liable.<sup>2</sup> But what just distinction can be drawn between leaving it unfastened and fastening it so insecurely that the ingenious infant can set it loose?— as in the last cases, by a rope on a sliding wooden bolt. The better opinion is that if the means of fastening are so simple and easy of removal as to furnish no obstacle to children seeking to unfasten and remove the turntable, the company does not fulfill the measure of care required of it.<sup>3</sup> In this case, where the fastening was an iron latch, the Minnesota court seems practically to have retracted its former holding about fastening in the ordinary and customary manner. The fact is that it is perfectly practicable and easy for a railroad company to keep these dangerous machines locked, and they should be required to do so, and then no harm could ensue unless the child picked or broke the lock, in which case of course no liability could attach, for the company would have done all that was reasonably necessary.

<sup>1</sup> *Daniels v. N. Y. & C. R. Co.*, 154 Mass. 349; 26 Am. St. Rep. 253; *Walsh v. Fitchbury R. Co.*, 145 N. Y. 310; 45 Am. St. Rep. 615; 27 L. R. A. 724; *St. Louis & C. R. Co. v. Bell*, 81 Ill. 76; 25 Am. Rep. 269; *Frost v. Eastern & C. R. Co.*, 64 N. H. 220. See

"The Siren Turntable," 4 Green Bag, 124.

<sup>2</sup> *Kolsti v. Minn. & C. Ry. Co.*, 32 Minn. 183; *Bates v. Ry. Co.*, 90 Tenn. 86.

<sup>3</sup> *O'Malley v. St. Paul & C. R. Co.*, 43 Minn. 289.



But where a heavy hand-car was left unfastened on the side of a railway track, a mile from the thickly settled part of a city, and in swampy ground, and boys lifted it four or five feet on to the track, and one of them was hurt in riding upon it, it was held that the defendant was not responsible.<sup>1</sup> The court thought the hand-car was not a dangerous thing like a turntable, and compared these athletic and enterprising youth to those who should take a sled from private premises without permission and get hurt in coasting on it. The same was held where the child came upon a yard, inclosed with a high board fence, and with locked gates, and toyed with a coal dump which was in a condition unsafe for children.<sup>2</sup> Diligence in trying to keep the children out was shown, but they would climb or break the fence and break the locks of the gates, and "it would have required an army of policemen to keep them out."

Boys are strongly inclined to sail or fish or swim in ponds on private grounds, and the courts have had to consider the duty of the owner to keep such waters fenced or walled in view of this childish propensity. It is probable that the weight of opinion is that the duty does not attach unless they are in their nature dangerous to passers on the street or there has been some implied license to allow the near approach of the public. It is obvious, said the court in one case, "that a fence would have to be very high and very tight to afford any effectual guard against children having access to the pond."<sup>3</sup> In *Gillespie v. McGowan*, Paxson, J., said: "There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it, or fill up their ponds and level their surface so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any

<sup>1</sup> *Robinson v. Oregon &c. Ry. Co.*, 7 Utah, 498.

<sup>2</sup> *O'Connor v. Railroad Co.*, 44 La. Ann. 340.

<sup>3</sup> *Klix v. Nieman*, 68 Wis. 271; 60 Am. Rep. 954. To the same effect: *Peters v. Bowman*, 115 Cal. 345; 56 Am. St. Rep. 106; *Overholt v. Vieths*,

93 Mo. 422; 3 Am. St. Rep. 557; *Hargreaves v. Deacon*, 25 Mich. 1; *Gillespie v. McGowan*, 100 Pa. St. 144; 45 Am. Rep. 365; *Richards v. Connell*, 45 Neb. 467; *Clark v. Richmond*, 83 Va. 355; *Moran v. Pullman P. Car Co.*, 134 Mo. 641; 33 L. R. A. 755.

such principle, even when the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They shoot, fish, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit, yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser might possibly fall from its branches." And his Honor might have added, "or to guard his melon patch because boys steal melons and get colic." In *Peters v. Bowman*, the court said that a turntable can be rendered absolutely safe by locking, but a pond cannot be made inaccessible by fencing, nor by any means short of filling or draining. Water is scarce in California; hence ponds are highly valued there. The court admitted that *City of Pekin v. McMahon* was an authority against them, but they need not have made that concession, for the pond in that case was on public and unfenced lands, and the case is analogous to the highway cases. The same doctrine obtained in a case where a child fell into a pool of hot water made by discharge from a distillery on private grounds, it not being shown that the place was attractive to children.<sup>1</sup> Otherwise, however, if the place was attractive to children and the defendant should have known it.<sup>2</sup> Courts ought to take judicial notice that children always love to "get into hot water."

So where mill-owners have been accustomed to let children play on piles of coal ashes, in their uninclosed and publicly situated yard, they may not dump hot ashes on the piles without notice or exclusion of the children;<sup>3</sup> and it is the duty of one who keeps dynamite on his own land, near where people are accustomed to pass, to guard it so that meddlesome children may not play with it and get hurt.<sup>4</sup> On the other hand, it was held not negligent in school authorities to suffer a contractor to leave

<sup>1</sup> *Schmidt v. Kansas City D. Co.*, 90 Mo. 284; 59 Am. Rep. 16.

<sup>2</sup> *Brinkley Car Co. v. Cooper*, 60 Ark. 545; 46 Am. St. Rep. 545.

<sup>3</sup> *Penso v. McCormick*, 125 Ind.

116; 9 L. R. A. 313; 21 Am. St. Rep. 211.

<sup>4</sup> *Powers v. Harlow*, 53 Mich. 507; 51 Am. Rep. 154; *Harriman v. Ry. Co.*, 45 Ohio St. Rep. 11; 4 Am. St. 507; *Carter v. Col. & C. R. Co.*, 19 S. C. 20.

a well-drilling machine in the school yard, unlocked and unguarded, by means of which a young investigator of science was injured outside of the school drill.<sup>1</sup> The court there observed: "We are not prepared to hold that every person having upon his premises machinery, tools or implements which would be dangerous playthings for children, and in their nature affording special temptation to children to play with them, is under obligation to guard them in order to protect himself from liability for injuries to children received while playing with them, although the children were rightfully on his premises. It would be improper to burden the mechanical industries of the country by such a rule."

If a child is on a private alley for his own amusement he may not with impunity be hurt by the falling of a ruinous wall upon him;<sup>2</sup> nor be crushed by the falling of a platform used in handling goods at a warehouse.<sup>3</sup> Both these places were near the highway. In the latter the court said: "Perhaps the best monitor in such a case is the conscience of one who feels, in his dreadful recollection, the crushing sense that he had left such an engine of ill to take the life of an innocent child." "He had good reason to expect that one day or other, some one, probably a thoughtless boy in the buoyancy of play, would be led there and injury would follow."

Boys are wont to climb upon piles of lumber, and it behooves the lumberman to pile carefully, whether on sidewalk or on his own unfenced grounds which the public are accustomed to cross and children to play upon, with the knowledge and assent of the owner.<sup>4</sup> But such assent or acquiescence is essential, and where the presence of children is forbidden, and they are ejected when found intruding on the premises, nothing in the nature of an invitation can be presumed, and no duty is imposed on the owner to use care in the piling of his lumber.<sup>5</sup>

<sup>1</sup> *Wood v. Ind. School Dist.*, 44 Iowa, 27.

<sup>2</sup> *Schilling v. Abernethy*, 112 Pa. St. 487; 56 Am. Rep. 320.

<sup>3</sup> *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332.

<sup>4</sup> *Kerr v. Forgue*, 54 Ill. 482; 5 Am. Rep. 146; *Bryanson's Adm'r v. Labrot*, 81 Ky. 628; 50 Am. Rep. 193.

<sup>5</sup> *Vanderbeck v. Hendry*, 34 N. J. L. 467.

Similar rulings have been made in a case of unfenced cog-wheels near the street where children were accustomed to play,<sup>1</sup> and of an elevator in a coal yard, the gate of which had carelessly been left open.<sup>2</sup> But a boy cannot be justified in riding on a hoisting apparatus on private premises, in the absence of negligence and implied invitation, however attractive the machinery may be;<sup>3</sup> and in like manner it has been held that a railroad company is not bound to fence its yards in which cars are switched and trains made up, so as to protect children from danger.<sup>4</sup> And so if a child while trespassing upon open premises of a factory where type-setting machines are manufactured, and there stealing type-metal or scrap iron, is injured by a sudden discharge of steam from a pipe, his presence being unknown to the engineer, no liability attaches to the proprietors.<sup>5</sup> These facts lacked any element of invitation or attraction.

The case of *Birge v. Gardner*,<sup>6</sup> was where a child under seven shook and pulled a heavy gate (like the people in *Macbeth*), on the defendant's land, until it opened on him and hurt him. It cannot properly be claimed as a case of undue allurement, although infants, like persons of larger growth, like Mrs. Barbe Bleue, are always curious to get into prohibited domains. But the court left the question of contributory negligence to the jury, and herein I agree with Judge Thomson<sup>7</sup> in thinking that they went entirely astray.

It is almost superfluous to state that the transportation of the public may not be embarrassed by the proclivity of the small boy to ride on cars or other public conveyances without invitation or acquiring the rights of a passenger. As where one rides on the runners of a sleigh and gets more slaying than he bargained for.<sup>8</sup> This is one of the necessities which the public will stand

<sup>1</sup> *Whirley v. Whiteman*, 1 Head, 610.

<sup>2</sup> *Mullany v. Spence*, 15 Abb. Pr. (N. S.) 319.

<sup>3</sup> *Rodgers v. Lees*, 140 Pa. St. 475; 12 L. R. A. 216.

<sup>4</sup> *Barney v. H. & St. Jo. R. Co.*, 126 Mo. 372; 26 L. R. A. 847.

<sup>5</sup> *Mergenthaler v. Kirby*, 79 Md. 181; 47 Am. St. Rep. 371.

<sup>6</sup> 1 Conn. 507; 50 Am. Dec. 261.

<sup>7</sup> *Cases on Neg.*, p. 305.

<sup>8</sup> *Messenger v. Dennie*, 137 Mass. 197; 50 Am. Rep. 295.

no "monkeying with," and in regard to which humanity yields to business. The same principle is applicable to the case of cars moving in the business of grading a public street; the persons engaged therein are not bound to employ watchmen specially to keep children off the cars.<sup>1</sup> Even the newsboy boards a moving street car at his own risk.<sup>2</sup> And boys play with cars standing on side tracks, although the brakes are defective, and hand cars unlocked, at their own risk.<sup>3</sup>

Three very recent cases, all proceeding from conservative States, are noteworthy as preserving the policy of their law on this subject. In the one<sup>4</sup> it is held that a shop-keeper is not liable for the loss of the fingers of a little child less than seven years old, who put her hand up to the spout of a coffee grinder while in the shop with her father to make a purchase. Holmes, J., said: "Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property right because the temptation to untrained minds to infringe them might have been foreseen. The case is similar in principle to *McGinness v. Butler*,<sup>5</sup> and to *Mangan v. Atterton*,<sup>6</sup> which, notwithstanding the observations in *Clark v. Chambers*,<sup>7</sup> has been cited in this commonwealth repeatedly as unquestioned law."<sup>8</sup> In another,<sup>9</sup> a boy of thirteen skated on ice three days old, formed over a cutting on the Hudson river, guarded on only three sides, by lines of bushes. He was familiar with the place, and knew that the ice was new. The new ice was only three-quarters of an inch thick, and he broke through and was drowned. It was held that the defendant was

<sup>1</sup> *Emerson v. Peterler*, 35 Minn. 481.

<sup>2</sup> *Mills v. Woolverton*, 9 App. Div. 82.

<sup>3</sup> *Roddy v. Mo. P. R. Co.*, 104 Mo. 234; 12 L. R. A. 746; *Robinson v. Oregon &c. R. Co.*, 7 Utah, 493; 13 L. R. A. 765.

<sup>4</sup> *Holbrook v. Aldrich*, 168 Mass. 15; 36 L. R. A. 493.

<sup>5</sup> 159 Mass. 233.

<sup>6</sup> L. R. 1 Exch. 239.

<sup>7</sup> L. R. 3 Q. B. Div. 327.

<sup>8</sup> See also *Hughes v. Macfie*, 2 Hurlst. & C. 744.

<sup>9</sup> *Sickles v. N. J. Ice Co.*, 153 N. Y. 83.

not liable, although it had not complied with the law requiring it to surround the cutting with bushes or other guards. "Sad misfortune," said the court, "but without remedy." Here it seems the allurement was not deemed potent enough to counterbalance the boy's presumed knowledge of going on thin ice. In the third,<sup>1</sup> the city had permitted builders to deposit lime on a public street; some of it had escaped from the barrels and lay on the ground; boys were playing at building house on a vacant lot in the neighborhood; they carried the stray lime to that lot and the plaintiff having a tomato can with water in it, another boy poured some of the lime into it, and an explosion followed,— "the boy, oh! where was he?" His eyes were destroyed. The action was dismissed on the plaintiff's opening, and this was affirmed on appeal. Hatch, J., thought the city authorities were not reasonably bound to foresee the deportation of the lime, the presence of water, and the action of the boys in mixing those articles together, and it would seem to require a pretty robust imagination to predicate such a concatenation even in the case of small boys.

The doctrine of allurement is relied on in a class of cases which hold a party liable for injury to an infant by intrusting him with firearms. As the toy pistol case,<sup>2</sup> citing *Lynch v. Nurdin*, *Townsend v. Wathen*, and other of the foregoing cases. Even Massachusetts falls in with this doctrine, and holds that one who sells gunpowder to an infant of eight, at his request, is liable for his blowing up.<sup>3</sup> These are both founded on *Dixon v. Bell*.<sup>4</sup> The Massachusetts court distinguish the case from *Hughes v. Macfie* and *Mangan v. Atterton* on the ground that in those the infant "was technically a trespasser."

In conclusion, let me suggest that the leaning of judges in this matter is probably much influenced by their observation of their own small sons, if they have any. Years ago I regarded the prevailing doctrine of the turntable cases askance, but since

<sup>1</sup> *Beetz v. City of Brooklyn*, 10 App. Div. 382.

<sup>2</sup> *Carter v. Towne*, 98 Mass. 567; 96 Am. Dec. 682.

<sup>3</sup> *Binford v. Johnston*, 82 Ind. 428; 42 Am. Rep. 508.

<sup>4</sup> 1 Stark. 287.

I have been blessed and bothered with a grandson, I have become quite reconciled to it. I recall that St. Paul, who studied law in his youth, when he was a child understood and thought as a child, and I own my allegiance to the Kansas judge who said: "Everybody, knowing the nature and instincts common to all boys, must act accordingly."

IRVING BROWNE.

BUFFALO.

## NOTES.

**OBITUARY OF THE PROFESSION.—WARREN M. BATEMAN**, one of the most distinguished lawyers of Ohio, died suddenly at the Riggs House in Washington, D. C., where he had gone to attend to a claim before one of the Departments of the Government. - - - **Ex-Senator SAMUEL J. R. McMILLAN** died at his home in St. Paul on the 3d of October. He was, for a good many years, a Justice of the Supreme Court of Minnesota, and served two terms as United States Senator.

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**THOMPSON ON BUILDING AND LOAN ASSOCIATIONS.**—One of the editors of this REVIEW has lately received a good many letters inquiring when his proposed work on Building and Loan Associations will be completed. He has in preparation no such work. If such a work is in preparation by any one of the numerous family of Thompson, it is not by the Thompson who figures as one of the editors of the **AMERICAN LAW REVIEW**. The publisher of the work named seems to have carefully avoided sending his circular to us. He has probably so framed it as not to show by what Thompson his work is to be written.

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**MUZZLING FREE SPEECH WITH INJUNCTIONS.**—A visit to Fairmont, W. Va., the scene of the late coal miners' strike, an inspection of the actual ground, and a hearing of a recital of the actual facts, show how grossly the newspapers misled the public judgment upon the question of the injunction issued by Judge Jackson, by denouncing it as an injunction against the freedom of speech. The strike leaders harangued, in season and out of season, not only in halls but in a public square, the ground of which belonged to the county and upon which the erection of a new court house has since been commenced. There was never the slightest attempt made by any one to interfere with their freedom of speech, and they were protected in that right by the police authorities, the same as an ordinary citizen would have been on an ordinary occasion.



**THE PRESIDENT OF THE UNITED STATES AND THE AMERICAN BAR ASSOCIATION.**—In the account of the proceedings of the American Bar Association in our last issue, we omitted to mention one of the pleasantest features of the meeting. Toward the close of the banquet, the President of the United States, accompanied by the Secretary of War and Senator Hanna, of Ohio, entered the hall and were escorted to seats on the platform by the side of the president of the Association, Hon. William Wirt Howe, of Louisiana. Mr. Howe introduced the President in a few happy remarks, announcing that the President had that day been elected a member of the Association. The President responded in a few well chosen sentences, thanking the Association for the honor conferred upon him. It is needless to say that, when this distinguished party entered the hall, the diners spontaneously arose.

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**MEETING OF THE SUPREME COURT OF THE UNITED STATES.**—The following press telegram dated Washington, October 11, gives an account of the meeting of this eminent judicial body after their summer vacation:—

The October term of the Supreme Court began to-day, with Chief Justice Fuller and all the associate justices in their seats. No business was transacted beyond the admission of attorneys to the bar. The court adjourned until to-morrow, in order to enable its members, in accordance with long-established usage, to pay their respects in a body to the President. Before adjourning the Chief Justice announced that motions would be heard to-morrow, and after these were made, the call of the regular docket would begin. There were sixteen admissions to the bar at to-day's sitting, and Mr. Richards, the new Solicitor-General, was formally presented to the court by Attorney-General McKenna.

After adjournment the justices were driven to the White House, where they made their first formal call upon President McKinley. The reception took place in the blue room, and besides all the members of the court there were present Attorney-General McKenna, Solicitor-General Richards and Mr. Correlle Barnes, Judge of Probate in England.

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**THE EMPEROR OF GERMANY AND LIBELS OF THE FOREIGN PRESS.**—A press dispatch from London dated October 4, states that the Emperor of Germany has been so childish as to address a note to the German ambassador at London, protesting vigorously against being held up to ridicule by the English press. The son of an English princess ought to have sense enough to forecast the reply which his foolish communi-

cation would receive. The political department of the British government has nothing to do with the censorship of the press in reference to opinions expressed concerning foreign sovereigns. Those persons have the same redress in actions for libel that any other person has. The great Napoleon was foolish enough to make the same attempt; he got the same reply; and he brought his action for libel, and was, of course, unsuccessful. It merely gave an eloquent English barrister the opportunity of impaling him before the public opinion of Great Britain. It may be remembered in this connection that in 1881 Johann Most, the well-known Socialist demagogue, now in the United States, was tried before a jury at Newgate, convicted and sentenced by Lord Chief Justice Coleridge to sixteen months' hard labor for a scandalous libel concerning the late Czar, in the *Freiheit*, a Socialist paper published here at the time.

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MANDAMUS TO THE GOVERNOR OF A STATE.—There is a valuable article upon this subject—none the less valuable because possibly a law student's thesis—from the pen of Ivan W. Goodner, who signs himself as from the University of Nebraska, Pierre, S. D. He takes up the question as it stood in England with regard to writs of mandamus against the king and crown officers, and traces it through the case of *Marbury v. Madison* and other Federal decisions, and gives the authorities for and against the use of the writ against the Governor of a State. It is a valuable article.<sup>1</sup>

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HON. JOHN A. FINCH AND "ROUGH NOTES."—In our last number<sup>2</sup> in describing the paper read by Hon. John A. Finch before the American Bar Association, we stated that Mr. Finch had long published a journal in the interest of insurance companies. This was inaccurate. The fact is that the only relation of this able lawyer with any insurance journal is that he furnishes an insurance paper published at Indianapolis under the name of "*Rough Notes*," with a digest of legal decisions upon insurance law. This digest embraces, as we understand it, all the legal decisions on insurance rendered by the English-speaking courts. It is annually bound in a volume, and some of the annuals have received favorable notice in the *AMERICAN LAW REVIEW*. Certainly the central idea which it was the purpose of Mr. Finch in his

<sup>1</sup> 8 Univ. Law. Rev. 335.

<sup>2</sup> 81 Am. L. Rev. 748.

address to enforce was that the law of insurance ought to be taught in the law schools, and that it ought to be so taught that the student should acquire some information as to the character of insurance companies and the tendencies of State legislation with reference to them and to their business. Whether the law of insurance is neglected in the law schools is a question on which we are not prepared to express an opinion. Certainly it ought not to be neglected. At the same time an amount of attention ought not to be given to it disproportionate to its importance when considered with reference to other titles of the law.

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THE COLORADO LEGAL ADVISER.—This is to be a monthly law and business magazine published by the Mills Publishing Company of Denver, Colorado. It is edited by J. Warner Mills, Esq., and the first number, issued on September first, is quite attractive and contains a large miscellany. It is ostentatiously divided into departments, and there are no less than twenty-two of these departments. The present number contains seventy-four rather large pages in type of moderate size. The leading article, by Mr. Mills, the editor, is on the subject of Mining and Real Estate Contracts and Commissions. There is an account of the movement to organize a bar association in the State of Colorado, written by Lucius W. Hoyt, Esq. It is to be regretted that this magazine has taken the name of another legal publication which has been long in existence, *The Legal Adviser*, of Chicago. This will lead to confusion, and is probably an infringement of the rights of the proprietor of that publication. Lawyers have not respected the proprietary rights of publishers in this regard as they should have done. For many years while Mills & Co. were publishing a monthly periodical at Des Moines, Iowa, called the *Western Jurist*, a lawyer was publishing at Bloomington, Illinois, a similar, and, we believe, an inferior publication, called the *Monthly Western Jurist*. The old moribund *American Law Register* appropriated the name *American Law Review* and put it into the belly of its own name, by calling itself the *American Law Register and Review*—a piracy of trade-name which, to our knowledge, has created confusion in several instances.

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DISFRANCHISING ILLITERATE VOTERS.—The electors of the State of Connecticut have just ratified, by a majority amounting almost to unanimity, a constitutional amendment which provides that "every

person shall be able to read in the English language any article of the constitution or any section of the statutes of this State before being admitted an elector." Heretofore, electors in Connecticut have been required only to read their own native language, and hence, a test of those who alleged that they could read in foreign languages was necessarily difficult. The effect of the amendment will be to disfranchise a mass of foreign ignorance. Constitutional amendments establishing educational qualifications for the elective franchise are by no means confined to the South. In 1894, the people of California adopted such an amendment by a vote amounting well nigh to unanimity.

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**ADMISSION OF A COLORED WOMAN TO THE BAR.**—In September last, Miss Lulie A. Lytle, a colored girl, 23 years of age, was admitted to the bar, in one of the State courts, at Memphis, Tenn., without opposition or question. Thereupon, the daily newspapers throughout the country, even those of the better sort, published her portrait and heralded her admission to the bar as a great event. The event, at least, afforded them a temporary and shallow sensation for shallow people, in the absence of more substantial news. It was everywhere stated that she was the first colored woman ever admitted to the bar in this country. This was a mistake. The honor of admitting the first colored woman to the bar was achieved by the city of Chicago, where Miss Ida Platt, who had graduated from the Chicago College of Law, was admitted to the bar in 1894. Miss Lytle is said to have graduated at Central College, Tennessee, and it is said that she had served as a clerk to the Kansas Legislature, and that she will practice law in Topeka. Her newspaper portrait represents her as a very handsome *white* woman. The admission of young girls to the bar, white or colored, can neither elevate the bar nor advance the dignity of womanhood.

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**ENJOINING THE SUPREME COURT.**—Injunctions affecting litigation operate *in personam*. The court is not enjoined, but the party is enjoined from proceeding in the court. A remarkable extension of this writ is said to have been made by Judge C. R. Scott of the State District Court at Omaha, Nebraska. An order having been procured from the Supreme Court of that State, directing a receiver to pay over to a litigant the amount of his claim, and the receiver having refused to pay the same because of a lack of funds, the counsel for the party obtain-

ing the order threatened to apply to the Supreme Court for process of contempt. Thereupon, the receiver obtained from Judge Scott an injunction restraining and enjoining the counsel who had thus threatened to apply to the Supreme Court "from applying to the Supreme Court for an order upon said plaintiff to show cause why he should not be fined for contempt of court, or if he has filed such application he be restrained and enjoined from further proceedings in the matter of obtaining said order."

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**CONTEMPT FOR AN OFFICER OF THE COURT TO CRITICISE ITS DECISION.**—It seems that Omaha is not the only city which can boast of an eccentric judge. A deputy sheriff of the city of St. Louis took the liberty of giving a newspaper interview in which he related the impressions he had received while taking prisoners to the Reform School. He said that one of the greatest abuses, in his opinion, was that boys were sentenced to the Reform School for terms of one year, while the law provided that they should be sentenced for not less than two years. When the judge who had been imposing these sentences saw this printed interview, he cited the deputy sheriff to show cause why he should not be punished for contempt of court, in that, being an officer of the court, he had presumed to criticise the court. A more absolutely illegal and senseless proceeding has never come to our attention. The deputy, who was a young man, appeared and apologized, and the proceeding was dismissed.

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**PROFESSIONAL MISCONDUCT — ABUSING THE TRIAL JUDGE IN A BRIEF FILED ON AN APPEAL.**—An incident well worthy the attention of the profession, occurred in the United States Court of Appeals, sitting at St. Paul, on the 14th of September. In the case of *Kelley v. Boettcher*, ex-Judge E. B. Green, of Denver, appeared and argued the case for one of the parties, and, in the course of his oral argument, as well as in his written brief, he denounced in the most unmeasured terms the conduct of the United States District Judge, before whom, sitting at Circuit, the cause had been originally heard. He charged him with a deep and deadly prejudice, with continually struggling to pervert, distort and misconstrue all of the circumstances, showing the most aggravated and gigantic fraud, etc., etc.; in short, if we were to reproduce any considerable portion of the intemperate language which this counselor deliberately put in print and laid before a court of

exalted rank and high character, we should merely make the columns of a magazine devoted to discussions of movements in jurisprudence, the vilest sewer of scandal. At the close of his argument, Mr. Justice Brewer expressed himself as being grieved and hurt at what he had heard from the counsel for appellants concerning the judge who presided at the court below. On the following morning when the court met, the court made an order striking the name of the misbehaving attorney from the record in the case, prohibiting him from further appearing in the case, and allowing his client thirty days in which to file another brief. So far as the attorney is concerned, it must be conceded that the discipline which the court administered was very mild.

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**A BREACH OF PROMISE CASE BETWEEN TWO DEAF MUTES.**—A novel breach of promise case was lately tried in the Supreme Court of New York at Brooklyn, wherein Annie Berlinger, a deaf mute, demanded \$50,000 from Jacob Scharlin, another deaf mute, for a breach of promise of marriage. The plaintiff, of course, gave her testimony at the trial wholly by signs, lip language and finger language, which was interpreted to the jury. She recovered a verdict of \$1,750.00. The verdict seems to have been largely won by the plaintiff's sister, who, when asked how the defendant had expressed his love for the plaintiff, clasped her hands, extended them yearningly, and then passionately clasped them over her heart. This settled the jury. If anything more was needed, it was supplied by a witness who testified that he saw Jacob kiss Annie. This was a species of lip language understood by every member of the jury. Besides, the letter written by Jacob to Annie, in which he repudiated the engagement, was couched in the following cold and heartless language:—

I received a letter from you to-day. I read it all. I want you to stop thinking of me, because I did not pay attention to you — you are a worthless girl. My parents said that I had a right to stop courting you. They found that I have a good judgment. If you can't go to school back, well, don't see me any more. I want my memory is gone if you don't see me for a long while. Don't write to me any more.

JACOB SCHARLIN.

This unique action was ably prosecuted by James M. Kerr, the celebrated law writer, and was defended by Abraham Levy.

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**ASSESSING JUDICIAL CANDIDATES.**—The late Henry George, shortly before his death, in a public speech, charged that an assessment of

\$35,000, which he called a blackmail, had been levied by Mr. Croker on each of the Tammany candidates for Judge of the Supreme Court, and that all of them had paid it except Roger A. Pryor, who was unable to pay the full amount, but paid \$15,000, which he succeeded in raising among his friends. This statement was that of an excited candidate for office, and is to be accepted merely for what it may be deemed to be worth. It is, however, true that in all our large cities judicial candidates are heavily assessed by their political committees. It is also true that this assessment is laid upon the principle of charging "all the traffic will bear." It is one of the evils incident to the election of judges. It is reached and corrected to some extent by the recent "Corrupt Practices Acts," which have been enacted in various States, limiting the amount of money which candidates for office may spend in an election.

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**JUSTICE FOR THE RICH AS WELL AS THE POOR.**—A series of remarkable criminal trials have lately taken place at Dalton, Ga., resulting in the conviction of seven train robbers and their sentences to various terms in the penitentiary, and also in the conviction of eleven prominent merchants charged with receiving stolen goods from these train robbers, and their sentences to pay various heavy fines and to serve various terms on the chain gang, from three to twelve months, according to the opinion with which Judge Fite handled their several deserts. The learned judge is said to have resisted an enormous pressure to make the sentences lighter. One trading company, of which one of the sentenced receivers of stolen goods was the head, went into the hands of a receiver. Another one of the sentenced receivers was president of a lumber company, and at the time of his sentence was away on his bridal tour.

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**INJUNCTIONS AGAINST BOYCOTTING.**—The United States Court of Appeals sitting at St. Louis, has recently decided, affirming the Circuit Court of the United States for the District of Kansas, in the case of *Ozley Stave Co. v. Hopkins*, that a proprietor has a right to an injunction restraining the members of a trade union from boycotting his business because he introduces in his manufacturing establishment, an improved machine, the use of which is disapproved of by the trade union. The decision is rendered by Judges Thayer and Sanborn, Judge Caldwell dissenting. We have not seen the text of the opinion, but the grounds on which it proceeds will readily occur to any lawyer

acquainted with the use of the injunction in such cases. Extracts from the dissenting opinion of Judge Caldwell, which have been published in the daily papers, indicate that his general view is that proprietors should not be allowed the factitious aid of injunctions against combinations of their workmen, but that both parties should be allowed to fight it out with the lawful weapons they have. We believe that the decision of the court is right; that a boycott, the object of which is to compel a man to refrain from doing something which the law of the land allows him to do, is a conspiracy to accomplish an unlawful purpose; and, the conspirators being insolvent, there is no remedy except that of an injunction, unless the criminal laws are resorted to, and these are notoriously inadequate.

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GOVERNMENT BY INJUNCTION.—Government by injunction, as it is now familiarly called, is receiving vigorous attacks all along the line. In the recent case of *Schradskie v. Appel Clothing Company*, wherein the plaintiff was given a perpetual injunction by the lower court restraining the defendant from advertising a certain stock of goods as bankrupt stock, the Court of Appeals of Colorado reverses the decree and remands the cause to the trial court, with instructions to dissolve and dismiss the bill. "We cannot approve a practice," said Judge Wilson, "nor subscribe to a doctrine which permits the exercise by the courts of the extraordinary power of injunctive relief for every wrong or infringement upon the rights of another. Such a course of procedure, if carried to its ultimate natural conclusion, would tend to entirely subvert the fundamental principles upon which our system of laws is founded."

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SALE OF THE UNION PACIFIC RAILROAD.—Attorney-General McKenna certainly deserves and receives great credit for so attending to the interests of the government in the foreclosure proceeding against the Union Pacific Railroad, as to secure the entire claim of the government, so far as the main line is concerned. It is true that at one time, it seemed that the government was going to lose a large amount, but a new arrangement was made by which its interests were saved. Possibly, the administration may have been stirred to the new movement by the vigorous attacks of the opposition press and the pendency of elections. However, it is not right to place an improper motive upon a proper act. The suit was a suit to foreclose the first mortgage, which



took precedence of the lien of the government, which was in the nature of a second mortgage. The government, being a junior mortgagee by its own voluntary consent, had no right to stay the prior mortgagee in the realization of his debt. Under these circumstances, the fact that the government claim was entirely secured is creditable to the administration and to Judge McKenna. It has been pointed out, and upon what seemed to be highly probable grounds, that this was rendered possible by the business revival which has taken place during the present year.

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**VERDICT AGAINST A LADY FOR A BREACH OF PROMISE.**—The St. Louis *Globe-Democrat* thus editorially refers to a somewhat remarkable case in Maine:—

A valuation has been fixed at last on a masculine heart when trifled with by one of the softer sex. In Maine a jury has awarded damages amounting to \$1,789 against a young woman who disappointed an expectant bridegroom at the last minute. The amount asked was \$25,000. Why it was scaled down to the nice figure of \$1,789 is not explained, but the award is at least an assurance that the male cardiac muscle has a value, and that everything is not fair in love when the victim is only a man. The damages are large enough for a Klondike grub stake, and may lead on to fortune and a girl who will stick.

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**MARRIAGES AT SEA HELD TO BE VOID IN CALIFORNIA.**—We are glad to notice that the California courts have, on at least two occasions, declared marriages performed at sea—meaning thereby beyond a marine league from the shore—invalid and void *ab initio*. The last California legislature passed a law which provided that a divorced person could not remarry within the State for a year from the date of the divorce, and attaching a penalty for any violation of the law. It was thought that a measure of this kind would lessen the large number of divorces yearly occurring, and would dampen the oft inexplicable ardor of some married people to extricate themselves from one bond of matrimony only to enter into another. But the old adage, that there are more ways of killing a cat than one, was impressively brought to mind; for impatient and restive divorcees found a way to evade the law, and as they thought with perfect impunity and safety. The practice was to hire a tug and go out on the Pacific Ocean some few miles from shore, and call into requisition the services of the captain to tie the knot. The marriage, being more than three miles from shore, was considered as having taken place outside of the State, and the con-

tracting parties not subject, therefore, to the distasteful California statute. Two of the Superior Judges of California have, however, thrown a damper on this sort of mock marriage, and have declared it void. And so it should be! The whole proceeding is a farce. It is true that it is a familiar canon of the law of marriage that a marriage valid in the place where solemnized is valid everywhere; and had the offending parties gone into an adjoining State, such as Nevada or Oregon, and had been married under the laws of either of those States, no legal objection could probably be raised in California should the parties return to that State. But how this doctrine can apply to a place such as the Pacific or any other ocean or sea where, confessedly, no law on that subject prevails, is difficult to understand. If any law prevails at all, according to the equally well-settled rule of international law, it is that the law of the deck of a vessel is that of her flag and of the territory to which she belongs. It is safe to assume that the tugs in the two instances referred to were enrolled in California and the law of that State governed their decks. By this fiction of law, the act prohibiting a divorced person from remarrying within a year, was as potent and effective as it would be upon every foot of California soil. We are glad to see that the California courts have taken this position, and, if the cases are appealed, we have no doubt of the action of the Supreme Court affirming the rulings. — M. B. W.

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**SECRECY THE EVIL OF THE PARDONING BUSINESS.**—The New York *Evening Post* well says:—

One scandalous feature of the pardoning business in this country is the secrecy with which it is so often conducted. There is nothing that the friends of a criminal who has no just claim to executive clemency are so anxious about when they begin operations in his behalf as to make sure that nothing shall get into the papers about the matter until the pardon shall have been granted. The constitution of Mississippi contains a provision which blocks such schemes. It prohibits the issue of a pardon for felony, as well as a commutation of sentence, until the application for such pardon shall have been published thirty days in some newspaper in the county where the crime was committed, and requires that the petition thus published shall set forth the reasons why the pardon is asked. A rule of this sort ought to be made in every State.

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**ACCEPTING A PARTY NOMINATION FOR A JUDICIAL POST IN A PARTISAN SPEECH.**—The many admirers of Judge William J. Wallace of the Circuit Court of the United States for the Second Circuit, have regretted

to read in the newspapers that, when notified by a committee, headed by Senator Platt, of his nomination by the Republican State Committee for the office of Chief Judge of the New York Court of Appeals, he deemed it his duty to make a political speech. Among other things, he is reported to have said: —

I esteem it an inestimable privilege to have been associated with that party when it fought for denationalizing slavery; when it piloted the nation through the civil war to a vindicated constitution and a restored union; when it rehabilitated the Republic into an enduring brotherhood of States; through the years of marvelous prosperity that blessed the country under its administration of the government and through those recent perilous days when the rights of property and the interests of honest labor, the just claims of public and private creditors, the supremacy of law and the foundations of social order, found in their bulwark of defense. I trust my candidacy will appeal to Republicans.

A reading of this speech tends to temper the feeling of regret, which one might otherwise have, over the fact that an old and distinguished jurist was decisively defeated at the polls.

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**RIGHT TO INSPECT AND RIGHT TO TAKE COPIES.**— A power to inspect any documents does not necessarily imply a power to take copies of them. For instance, the public can inspect wills in Somerset House, but they cannot take copies of them. Sometimes the power of taking copies is specified as an addition to that of inspecting. In the case of an acknowledgment under section 9 of the Conveyancing Act 1881, the person to whom the acknowledgment is given has the right, not of making copies, but of having them delivered to him. On the other hand, under section 16, a mortgagor can inspect and *make* copies of the documents of title relating to the mortgaged property. By the Companies Act 1862,<sup>1</sup> the register of mortgages has to be open to inspection by any creditor or member of the company at all reasonable times. Nothing is said as to a right of making or compelling delivery of copies. In the case of *Mutter v. Eastern and Midland Railway Company*,<sup>2</sup> decided under the Companies Clauses Act 1863,<sup>3</sup> the Court of Appeal held, that the statutory right of a stockholder, etc., to inspect and peruse the register of debenture stockholders includes a right to take copies. Lord Justice Lindley, in delivering judgment, said that an examination of the authorities had led him to the conclusion that, speaking generally, a right to take copies is always treated as incidental to a right to inspect. "When the right to inspect and take a copy is

<sup>1</sup> Section 43.

<sup>2</sup> 59 L. T. Rep. 117; 38 Ch. Div. 92.

<sup>3</sup> Section 28.

not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy, and on what is reasonably necessary for the protection of such interest." The question has also recently come before Mr. Justice Stirling in *Nelson v. Anglo-American Land, Mortgage, and Agency Company*,<sup>1</sup> under the above section of the Act of 1862, and he has held, that a debenture-holder is entitled to take copies of, as well as inspect, any matter appearing on the register.—*Law Times* (London).

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**NERVOUS SHOCK.**—The interesting question of the liability for a negligent act producing a mere nervous shock or mental injury—the subject of decision by the Privy Council in *The Victorian Railways Commissioners v. Coultas*,<sup>2</sup> has been decided in the New York Court of Appeals,<sup>3</sup> and it was there held, in harmony with the English case, and reversing the decisions below, that there is no liability where a negligent act produces mere fright in a woman, although it results in a miscarriage. The court held that the damages were immediate and proximate, but based its decision mainly on the ground that there is no right of recovery for injuries produced merely by fright, no matter how serious, or however directly the result of the mental shock. There is a little authority to the contrary in the States and in Canada, and the authorities are arranged in the American notes in 8 Eng. Rul. Cases.<sup>4</sup> —*Montreal Legal News*.

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**THE MARITAL RIGHTS OF BELGIAN HUSBANDS OF AMERICAN WIVES.**—The following account of a lawsuit depending in a court in Belgium, which we take from the *Belgian News and Times* for September 29, affords an impressive lesson to those rich American parents who are seeking to marry their daughters off to the scions of ancient families in foreign countries:—

An important suit will come up for hearing at an early date in the Brussels courts, involving a point of international law arising out of the law of domicile that presents features of interest, as the following details show:—

Dr. Niles, late American ambassador at Paris, married in 1868 the Baroness Sue, widow of Eugène Sue's father. He died at New York in 1869, leaving

<sup>1</sup> 75 L. T. Rep. 482.

<sup>2</sup> To be reported in 151 New York

<sup>3</sup> L. R. 13 App. Cas. 222; 8 Eng. Rul. Cases, 405.

Reports.

<sup>4</sup> 414.

twin-daughters, Rose and Blanche. The first married Martino van Buren-Wilcoxson; the other daughter remained single. The Niles estate is worth now from 80,000 to 100,000 dollars a year. It was valued at the probate of the will at 800,000 dollars, or 4,000,000 francs. By it, Dr. Niles bequeaths the whole of his real and personal estate to his executors; namely, his two daughters, Martino Niles Wilcoxson, his son-in-law, and his nephew, N. Niles, and their survivors. The will, however, is a peculiar one; firstly, all the rents out of the estate are to be paid to his two daughters against their sole and personal signature, free from the debts, interference, or control of their husbands. Secondly, in case one or both of them should die leaving a husband, such husband shall take individually, a life interest of 10,000 dollars payable quarterly, and the estate is charged to pay such rents, even if the property should pass into other hands after the death of his daughters. At the death of Mr. Niles' daughters the property is devised to their lawful issue, if any, otherwise to a nephew, Mr. Marston Niles.

After the death of Dr. Niles, a son, Martino Niles Wilcoxson, was born from the marriage of Miss Rose Niles de Miehau with Mr. van Buren-Wilcoxson. This son married in 1892 a lady of the State of New York by whom he had issue, and as his aunt died leaving no children, all this real and personal estate returns to him at the twin sister's death. In 1874, Mr. Van Buren-Wilcoxson died in England at the country seat of General Badeau, consul-general of the United States. In 1875, at Cramercy Park, New York, Miss Blanch Niles married General Adam Badeau. The next year at Schaerbeek was celebrated the marriage of the dowager Mrs. van Buren-Wilcoxson with M. Amédée Wilbaux of the Tournal family. Soon after the wedding Mrs. Wilbaux was ordered home for her health, and M. Wilbaux and Mrs. Wilbaux with her son and her sister, Mrs. Badeau, went to the States. General Badeau asked M. Wilbaux to inquire how the cousin Mr. N. Niles, who had been intrusted by the ladies with the management of the property, fulfilled the charge. The result was so far from satisfactory that the ladies following the advice of their husbands commenced a lawsuit against Mr. N. Niles, one of the executors of the will, asking the court to appoint a receiver. A "wanting balance" having been covered by Mr. N. Niles, the judge refused to appoint a receiver. Unfortunately at that time Mrs. Wilbaux was in very poor health and not able to stand the worries of a lawsuit and her husband let the whole matter drop.

This proved to be a dangerous slip, for the cousin, Niles, made use of Mrs. Wilbaux's indifferent health, and had no difficulty in getting the better of the contest with Mrs. Badeau who had persevered alone, but who was heavily handicapped by the action of her sister. The result was and is that even now the two ladies are complaining of not receiving more than the quarter of their income.

Up to 1898, the family intercourse between Mrs. Wilbaux, Mrs. Badeau, Martino van Buren-Wilcoxson, and M. Amédée Wilbaux was most cordial, but shortly after a family meeting at Paris, M. Wilbaux thought it was his duty to send Mr. Martino van Buren-Wilcoxson, who was then a major, a copy of the will, a copy of the accounts of 1876, and to advise him as probable heir to claim the right to be executor as the survivor of his father, and to get in his hands the management of the property and especially to ask the executor Niles for the long deferred balances of the accounts which had not been handed to the

twin sisters since 1876. The consequence was that on the advice of Mr. Niles, all intercourse with M. Wilbaux came suddenly to an end. General Badeau died in 1894, and he and M. Wilbaux had always been fast friends.

Through her marriage Mrs. Wilbaux became a Belgian, and according to Belgian law no testamentary disposition can prevail against the *pouvoir marital*. Mrs. Wilbaux spending the summer at Ostend with her sister and M. Van Buren-Wilcoxson, Messrs. Emile Stocquart, barrister, and Fortin, solicitor, acting on behalf of M. Wilbaux, got an order from the president of the court in Brussels, to summon Mrs. Wilbaux before the "Chambre de vacation," where Messrs. Bruyneel, barrister, and van Hoorde, solicitor, appeared for Mrs. Wilbaux. There it was agreed to let the case stand over till 23d October. Nevertheless on a motion of M. Stocquart, the president of the court issued an order, which has been duly served on the three executors and on Mrs. Wilbaux, to the effect that henceforth all sums arising from the private property of Mrs. Wilbaux, or from her part out of the Niles Estate, can only be paid against her husband's signature and that all sums paid since her marriage with M. Wilbaux and against her personal signature have been wrongly paid. The injunction gives full power too to M. Wilbaux to distrain on all money, stocks, furnitures, etc., belonging to his wife and to him (in common) wherever they may be.

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A MASSACHUSETTS VIEW OF "GOVERNMENT BY INJUNCTION." — The following is a communication by William N. Osgoode, of the Boston Bar, to the *Boston Globe* for October 18:—

Government by injunction is a matter of considerable importance to every citizen, and one that is being carefully examined by many public speakers and writers at the present time. It is a very debatable question, whether there is not a tendency on the part of the modern courts of equity to depart somewhat from the original purpose and theory of equity jurisprudence.

Originally courts of equity, according to Bispham, were instituted to enable "poor and lowly suitors to enforce their rights," either as "plaintiffs or defendants against the rich and the powerful," when they had no remedy at common law, and "the interference of the chancellor was invoked in many instances, solely upon the ground of personal inability to obtain justice as against a powerful adversary." That is to say, the man, and the weak man at that, was originally the concern of equity, and not the powerful citizen or property.

Now we are told by many courts that the remedy of issuing injunctions against striking employes is merely the employment of a means to protect property when other remedies fail or are inadequate. In other words, are the courts not a little too much inclined to regard property rights and its sometimes powerful owners too sacredly in comparison with the "lives and liberty" of the citizens?

In the constitution of Massachusetts great stress is laid upon the inalienable right of the citizen "of acquiring, possessing and protecting property," but the right "of enjoying and defending their lives and liberties" is placed first. Have the courts in any instances placed property rights before the rights of liberty? The interstate law was framed in the interests of the citizens against

large aggregations of wealth, but has been applied more particularly against striking railroad employes, contrary to the probable anticipation of its original framers.

The extraordinary injunction issued by the court in West Virginia against the striking miners was grounded, among other things, upon the "insolvency of the strikers."

The case of *Vegelahn v. Guntner*, a recent Massachusetts case, states the law in relation to the subject under discussion, and that case has the advantage of being decided since the *Debs* case was decided by the Supreme Court of the United States. The courts are concerned, generally speaking, to conscientiously determine what the law is, and not what it ought to be, and the law as laid down in the above case can safely be deemed a fair statement of the law of the land as well as of this commonwealth.

In that case we have two dissenting opinions, one by Chief Justice Field and the other by Justice Holmes, and in all likelihood those dissenting opinions substantially outline the law of the future in relation to the issuing of injunctions against striking employes. In these opinions it is pointed out that the way in which these injunctions have been issued by the courts is a comparatively recent innovation, and should be used with caution.

It is also indicated that in Massachusetts we have a variety of remedies which may be used against striking employes, such as an indictment for conspiracy to injure the employer's business, fining of employes who by intimidation or force seek to hinder others from entering into or continuing in the employment of any person or corporation, and an action for damages.

In the above case the majority of the court issued an injunction restraining certain acts of the striking employes, such as parading in front of the premises of the employer and seeking to hinder others from entering into or continuing in the employment of the employer, and other acts which in themselves were peaceable, but the majority of the court held that it was proper to restrain the striking employes, provided those acts were a part of a scheme to irreparably injure the employer's business. The dissenting justices, on the other hand, were disinclined to restrain peaceable acts which in themselves did not necessarily tend to cause an irreparable injury to the employer's business.

It is for the legislature to define what acts of striking employes shall be restrained and what shall not be. When such limitations are enacted by the legislature, the citizens may rest assured that the courts will administer the law not alone in letter, but will correctly interpret its spirit.

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FEDERAL INJUNCTIONS AGAINST STATE DEPARTMENTAL OFFICERS.—The progress of Federal judicial supremacy is so rapid that nothing in that direction occasions much surprise. One after one, the States, which were once called sovereign, are, in the persons of their chief officers, hauled up for trial and sentence before the small Federal judges. To-day, it is Populistic Kansas; to-morrow, it may be Republican Massachusetts. The laws of Kansas provide that an insurance company shall not do business in that State without procuring a

license so to do from the Superintendent of Insurance of the State. For reasons best understood by himself, the Superintendent of Insurance issued no license to the Mutual Life Insurance Company of New York to do business in that State during the present year. The reason was stated in some of the newspapers to be that the insurance company had declined to pay a judgment, or judgments, which had been recovered against it in the courts of Kansas. As to what the real reasons were, or their validity, we know nothing beyond this statement. In open defiance of the laws of Kansas, that life insurance company continued to solicit insurance within the State of Kansas. The authorities of Kansas, including Attorney-General Boyle, took the view that if the Superintendent of Insurance was wrong in refusing to issue the license, there was a very simple method open to the company to correct the wrong by means of a proceeding by mandamus against the Superintendent in the State courts of Kansas, in which, it is said, the question of his right to refuse the certificate could have been speedily determined. But the company did not see fit to do this. It preferred to continue to do business in violation of the law of Kansas, and to seek the protecting wing of a Federal district judge in the meantime. This protection it obtained through an injunction granted by Mr. Federal District Judge Williams, of the United States District Court for the Eastern District of Arkansas, designated to hold the United States Court in the District of Kansas by Hon. W. A. Sanborn, United States Circuit Judge for the Eighth Circuit. The injunction, which was granted by Judge Williams, runs in the following language:—

IT IS ORDERED, ADJUDGED AND DECIDED, That the defendants herein, Webb McNall as Superintendent of Insurance, his clerks, agents and employés, and Louis C. Boyle, as Attorney-General of the State of Kansas, his clerks, agents and employés, be and each of them is hereby strictly commanded and enjoined from in any manner whatever interfering with The Mutual Life Insurance Company of New York, complainant herein, its officers, agents and employés, in the transaction of its life insurance business within the State of Kansas; and from in any manner whatever proceeding against said company, its officers, agents or employés, in any civil or criminal action, or from attempting to proceed against any of the officers, agents or employés of The Mutual Life Insurance Company of New York, complainant herein as aforesaid; or attempting to interfere or from interfering in any manner whatever with the Mutual Life Insurance Company of New York, complainant herein, its officers, agents and employés, in soliciting business, receiving premiums and issuing policies upon the lives of individuals within the State of Kansas under the pains and penalties which may fall upon them and each of them in case of disobedience. That they forthwith, and until the application for a temporary injunction can be heard, desist from harassing or troubling in any manner whatever the said



Mutual Life Insurance Company of New York, complainant herein as aforesaid, its officers, agents and employes in transacting the business of life insurance in the State of Kansas.

As the business of insurance is not commerce and, consequently, when carried on by an insurance company organized in one State within the limits of another State, is not interstate commerce,<sup>1</sup> we do not understand that there is any Federal question in this case, but suppose that the jurisdiction of the Federal court is founded on the diverse State citizenship of the parties.

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**WEST VIRGINIA BAR ASSOCIATION.**—This learned body held a very successful annual meeting at Morgantown on the 3d and 4th of November. Papers were read on the following subjects:—

"Some Professional Improprieties," by Joseph Moreland; "Government by Injunction," by W. G. Peterkin; "The Rent Remedy — A Relic," by B. L. Butcher; "State Taxation," by D. C. Westenhaver, and the annual address of the president, Hon. P. J. Crogan, which dealt with a review, mainly, of the laws, legislative and judicial, since the last meeting of the Association. Mr. Moreland's paper was highly entertaining and dealt with the shyster in a masterly and very scholarly manner, and treated generally of the ethics of the profession from a very high standpoint. Mr. Peterkin dealt with government by injunction rather from a historical standpoint, giving instances of the right to injunctions to prevent waste and irreparable injury, all through the history of the courts of this country and of England, holding that it was no new feature, and in the main holding that this alleged government by injunction was right. His paper provoked considerable discussion, mainly on the question of the jurisdiction of the Federal courts, in the cases that recently arose in that State, relative to the miners' strikes, and the discussion in the main was to the effect that the matter was for the State and not the Federal courts. Mr. Butcher's paper was a protest against the remedy in West Virginia to collect rent, which is the old remedy by distraint, etc., he holding that a landlord should be given no advantage over other creditors in the collection of his debt. "State Taxation," by Mr. Westenhaver, applied more particularly to the methods of assessing and collecting taxes, under West Virginia law, but was a very able paper on the general subject, treating of the proper subjects of taxation both for municipal and State

<sup>1</sup> Paul v. Virginia, 8 Wall. (U. S.) 163.

and county purposes. He showed that he had made a thorough study of the matter, and gave numerous references to the laws of other States and other countries.

In the president's address, in reviewing the acts passed by their legislature, he criticised some "crank" legislation, such as the "high hat" law, which passed the legislature of West Virginia and is now the law, and an act taking from cities and towns the right to regulate the running of bicycles, and giving the entire control of the matter to the State authorities. He suggested a constitutional amendment similar to that of Mississippi, giving married women the same rights as to property as men, and emancipating them from all disability, on account of coverture. This provoked considerable discussion. He also had the temerity to criticise a decision of the Supreme Court of West Virginia in this respect: They had heretofore held that a conductor having entire control and management of a train is the vice-principal of the corporation, for whose negligence it is responsible to subordinate servants. The court held this over and over, after thorough discussion in numerous cases. Recently, the court reversed its former decisions, and now holds the reverse of the above proposition, and Mr. Crogan's criticism was mainly on the doctrine of *stare decisis*, contending that the legislature should have been appealed to, to change the rule, if a change were desirable; but he held that a change was not desirable. This point of his address was discussed pretty vigorously. In their opinion, in changing the rule, the court gave, as a main reason, that they believed the rule now adopted was the better one, but that they would not feel at liberty to make the change, had not the Supreme Court of the United States changed its ruling of the question, by the decision in the Baugh case, overruling the decision of the same court in the Ross case.<sup>1</sup>

The Annual Address was delivered by Seymour D. Thompson, of St. Louis, on the subject of "Judicial Supremacy." It was mainly devoted to enforcing the idea that there can be no such thing as supremacy on the part of either of the three departments of our government over the others, and that whenever the people submit to have all the departments of their government controlled by an appointive judiciary, they have ceased to be free. The University of West Virginia kindly loaned its Auditorium for this address. A *musical* of half an hour preceded it, showing, with a genuine touch of surprise, what a small but cultured town can produce in the art that lifts man

<sup>1</sup> The decision of the West Virginia court, complained of, may be found in 27 S. E. Rep.; *Jackson v. Norfolk & Western Railway Co.*

farthest from earth and nearest to heaven. The great hall was filled by a cultivated audience of both sexes, and the speaker was attentively listened to for an hour and a half by perhaps twelve hundred people.

A banquet, which will compare favorably with those given by other bodies of this kind, closed the meeting, and in the small hours of the morning the members left for their homes on a special train.

**THE RETIREMENT OF MR. JUSTICE FIELD.**—At the opening of the present term of the Supreme Court of the United States in October, the venerable Justice Stephen J. Field communicated to his brethren the fact of his retirement (to take effect December 1st), in the following letter:—

Supreme Court of the United States, Washington, D. C., October 12, 1897.—Dear Mr. Chief Justice and Brethren: Near the close of last term, feeling that the duties of my office had become too arduous for my strength, I transmitted my resignation to the President, to take effect on the first day of December next, and this he has accepted, with kindly expressions of regard, as will be seen from a copy of his letter, which is as follows:—

“Executive Mansion, Washington, D. C., Oct. 9.—The Hon. Stephen J. Field, Associate Justice of the Supreme Court of the United States, Washington, D. C.—My Dear Sir: In April last Chief Justice Fuller, accompanied by Mr. Justice Brewer, handed me your resignation as Associate Justice of the Supreme Court of the United States, to take effect Dec. 1, 1897.

“In hereby accepting your resignation, I wish to express my deep regret that you feel compelled by advancing years to sever your active connection with the court of which you have so long been a distinguished member.

“Entering upon your great office in May, 1868, you will, on the first of next December, have served upon this bench for a period of thirty-four years and seven months, a term longer than that of any member of the court since its creation, and throughout a period of special importance in the history of the country, occupied with as grave public questions as have ever confronted that tribunal for decision.

“I congratulate you, therefore, most heartily upon a service of such exceptional duration, fidelity and distinction. Nor can I overlook that you received your commission from Abraham Lincoln, and, graciously spared by a kind Providence, have survived all the members of the court of his appointment.

“Upon your retirement both the bench and the country will sustain a great loss, but the high character and great ability of your work will live and long be remembered, not only by your colleagues, but by your grateful fellow-countrymen.

“With personal esteem and sincere best wishes for your contentment and happiness during the period of rest which you have so well earned, I am, dear sir,

“Very truly yours,  
“WILLIAM MCKINLEY.”

My judicial career covers many years of service. Having been elected a member of the Supreme Court of California, I assumed that office on October 18th, 1857, holding it for five years, seven months and five days, the latter part of the time being Chief Justice. On the 10th of March, 1863, I was commissioned by President Lincoln a Justice of the Supreme Court of the United States, taking the oath of office on the 20th day of the following May. When my resignation takes effect my period of service on this bench will have exceeded that of any of my predecessors, while my entire judicial life will have embraced more than forty years. I may be pardoned for saying that during all this period, long in comparison with the brevity of human life, though in retrospect it has gone with the swiftness of a tale that is told, I have not shunned to declare in every case coming before me for decision, the conclusions which my deliberate convictions compelled me to arrive at by the conscientious exercise of such abilities and requirements as I possessed.

It is a pleasant thing in my memory that my appointment came from President Lincoln, of whose appointees I am the last survivor. Up to that time there had been no representative here of the Pacific coast. A new empire had risen in the West whose laws were those of another country. The land titles were from Spanish and Mexican grants, both of which were often overlaid by the claims of the first settlers. To bring order out of this confusion Congress passed an act providing for another seat on this bench, with the intention that it should be filled by some one familiar with these conflicting titles and with the mining laws of the coast, and as it so happened that I had framed the principal of these laws and was, moreover, Chief Justice of California, it was the wish of the senators and representatives of this State, as well as those from Oregon, that I should succeed to the new position.

At their request Mr. Lincoln sent my name to the Senate and the nomination was unanimously confirmed. This kindly welcome was extended in March, but I did not at once enter on the discharge of the duties of the office for the reason that, as Chief Justice of California, I had heard arguments in many cases in the disposition of which, and especially in the preparation of opinions, it was fitting that I should participate before leaving that bench; and I fixed the 20th of May as the day on which to take, as I did, the oath, because it was the eighty-second birthday of my father, who indulged a just pride at my accession to this exalted position.

At the head of the court, when I became one of its members, was the venerable Chief Justice Taney, and among the associate justices was Mr. Justice Walte, who had sat with Chief Justice Marshall, thus constituting a link between the past and the future, and, as it were, binding into unity, nearly an entire century of the life of this court. During my incumbency three chief justices and sixteen associate justices have passed away, leaving me precious remembrances of common labors and intimate and agreeable companionship.

When I came here the country was in the midst of war. Washington was one great camp, and now and then the boom of cannon could be heard from the other side of the Potomac. But we could not say "*inter arma silent leges.*" This court met in regular session, never once failing in time or place, and its work went on as though there were no sound of battle. Indeed, the war itself simply added to the amount of litigation here as elsewhere. But the war ended in a couple of years and then came the great period of reconstruction and the last

amendments to the Federal constitution. In the effort to re-establish the nation, to adjust all things to the changed political, social and economic conditions, questions of far-reaching import were developed — questions of personal liberty, of constitutional right, which, after oftentimes heated discussions before the people and in the halls of Congress, came to us for decision. I do not exaggerate when I say that no more difficult and momentous questions were ever presented to this or any other court. I look back with pride and joy to the fact that I was permitted to take part in the consideration of all those important questions, and that not infrequently I was called upon to express the judgment of this court thereon. And now that those times of angry debate, deep feeling and judicial decision have passed, it is pleasant to realize that the conclusions announced by this court have been accepted, not simply of necessity, as so prescribed by the fundamental law, but, in the main, as in themselves both correct and wise.

As we all know, the period of war was followed by one continuing event to the present time of marvelous material development. Wealth accumulated — such as was never before dreamed of in this country. Gigantic enterprises were undertaken and carried through. Inventions have multiplied the conveniences of life, as well as the possibilities of achievement. Indeed, the conditions of life have essentially changed from those that prevailed prior to the war. Out of this changed social and economic condition have sprung not merely an immense multitude of cases, but litigation of a character vitally affecting the future prosperity and safety of this country. To this court have come for final solution and decision many of these questions and cases. By the blessings of Almighty God, my health and life have been preserved, and I have been enabled to take part in the consideration of all these cases. Few appreciate the magnitude of our labors. The burden resting upon us for the last fifteen or twenty years has been enormous. The volumes of our reports show that I alone have written 620 opinions. If to these are added fifty-seven opinions in the Circuit Court, and 365 prepared while I was in the Supreme Court of California, it will be seen that I have voiced the decision in 1042 cases.

It may be said that all of our decisions have not met with the universal approval of the American people, yet it is to the great glory of that people that always and everywhere has been yielded a willing obedience to them. That fact is eloquent of the stability of popular institutions and demonstrates that the people of the United States are capable of self-government.

As I look back over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a republican government. But it is the most democratic of all. Senators represent their States and representatives their constituents, but this court stands for the whole country, and as such it is truly "of the people, by the people and for the people." It has, indeed, no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government, and it is an additional assurance when the power is in such hands as yours.

With this I give place to my successor, but I can never cease to linger on the memories of the past. Among the compensations for all the hard work that a seat on this bench imposes have been the intimacies and friendships that have been formed between its members. Though we have often differed in our opinions, it has always been an honest difference, which did not affect our mutual regard and respect. These many years have indeed been years of labor and of toil, but they have brought their own rewards, and we can all join in thanksgiving to the author of our being that we have been permitted to spend so much of our lives in the service of our country. With profound respect and regard, I am, my dear brethren, very sincerely and always yours,

STEPHEN J. FIELD.

The following is the court's reply:—

Supreme Court of the United States, Washington, D. C., October 18.—Dear Brother Field: We are profoundly moved by the letter in which you announce to us your retirement from the bench. The termination of a judicial career of such length and distinction cannot fail to inspire among all your countrymen, and, indeed, wherever the realm of jurisprudence extends, a keen sense of loss, which to your colleagues assumes the aspect of a personal bereavement. For the intimacy necessarily incident to the conduct of work so constant, so exacting, and of such vital importance as ours inevitably draws us together by ties of the closest character, which cannot be dissolved without emotions of deep sadness and regret. We feel that our parting involves not simply the deprivation of the assistance afforded by your learning, your vast experience, and your earnestness in advocacy of your convictions, but the severance of those relations which have contributed so much to lighten the hardest labors of the road.

This is not the time or place to dwell on the reputation you have achieved as a jurist. The record is made up and may safely be committed to the judgment of posterity. But we can not part with you as an active member of the court without the fervent expression of the hopes that you may be spared for many years to enjoy the repose you have so thoroughly earned and the commendation bestowed on good and faithful service. We are, dear Brother Field, your affectionate brethren.

MELVILLE W. FULLER,  
JOHN M. HARLAN,  
HORACE GRAY,  
DAVID J. BREWER,  
HENRY B. BROWN,  
GEORGE SHIRAS, JR.,  
E. D. WHITE,  
R. W. PECKHAM.

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**EXPERT WITNESSES.** — “The hired professional expert witness,” says an American writer, “has got to be such a nuisance, such an obstruction to the administration of justice, that he has been expelled from the courts of two civilized countries — France and Germany — and has been denounced and discredited in the highest courts of England and

the United States." This may be rather strong language to use of England, but it is undeniable that expert witness evidence with us is very expensive and unsatisfactory. Lord Campbell went so far as to say that hardly any weight is to be given to a scientific witness, and Sir George Jessel's epigram is well known. The expert comes with a bias on his mind to support the cause in which he is enlisted, and the result is that such witnesses are almost uniformly in conflict; days are consumed in cross-examinations to test the knowledge and skill of the witnesses. But, admitted the abuse, what, it will be said, is the remedy? One very simple one would be to have a scientific assessor or assessors to assist the court. The system of nautical assessors in Admiralty cases works smoothly and well; why should not the power of summoning assessors be exercised in other classes of actions? We should at least have the views of an independent scientific mind, disembarrassed of all partisanship or profit. — *Law Journal* (London).

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THE JUDICIAL GOWN IN ILLINOIS.—At the last meeting of the Illinois State Bar Association Mr. John H. Hamline, the president, referring to the new law under which the Supreme Court of the State would sit permanently at Springfield instead of migrating to different places to hold the court, advocated the wearing by the judges of the judicial gown, in the following language:—

I will venture to say that none of you ever entered the Palace of Justice in Paris, the Westminster Hall in London, or the Chamber of the Supreme Court of the United States at Washington, without yielding, insensibly, perhaps, to the feeling that the judicial gown was appropriate to such a place; without recognizing that appropriate judicial attire did direct the mind of the observer to the fact that the men before him were an elect body and one engaged in a different service, a nobler calling, than that of the majority of their fellow men.

If such reflections are inspired in you who are accustomed to school your feelings and emotions, how much stronger must the impression be upon the mass of the people; and if such be the impression, then it would seem that the judicial office must be dignified by the wearing of the robe.

It is fitting that those who administer justice for the people should surround their office with such attributes as may dignify it, such circumstances as may at all times call the attention of the beholder to the high calling in which they are engaged — the highest known to man — that of doing equal and exact justice between man and man. From the days of Solomon the robe has been the vestment of the judge. As well make the army of this republic march without its banners as to deny to its courts the robe of office. The flag does not fight, the robe does not pronounce decisions, but both appeal, and in like manner to the sentiment of the people. The flag expresses the militant patriotism of the

republic; the robe says to the observer: "At this shrine justice is enthroned, and justice will be done though the heavens fall."

This recommendation created quite a controversy among our legal contemporaries in Chicago, participated in by some of the press outside the State of Illinois. The *Chicago Legal News* took strong grounds against the innovation, as being incompatible with our republican simplicity. The *National Corporation Reporter* and the *Legal Adviser*, both of Chicago, advocated the innovation. Some of the arguments *pro* and *con* are amusing. One of the retorts which came back to Judge Bradwell was an *argumentum ad hominem* to the effect that he, Judge Bradwell, was one of the highest members of the Masonic Order in the United States,—an order, which it is said delights in uniforms, insignias, etc. Brother Moses, of the corporation organ, has a memory that reaches back to the time when one of the editors of the *AMERICAN LAW REVIEW* opposed this innovation; and he now turns the tables on Brother Bradwell by quoting the following passage from a late speech delivered by the aforesaid editor:—

Of Jackson's character as a judge we know as little from tradition as from print. It is said that, when presiding, he wore a gown; if so, it indicates a proper appreciation of the dignity of his office. But it is to be said that there was then a greater disposition to imitate English habits and customs than there has been since the war of 1812. Some of those habits and customs might well be resumed. The judges of our appellate courts ought to be enrobed. The members of the bar and the auditors ought to rise spontaneously when the judges come into court to take their seats. The bar, standing, ought to bow to the judges, and the judges ought to bow to the bar as they do in France. And when the proclamation of the opening of the court has been made, the presiding judge ought to invite the bar to be seated before the business of the court is proceeded with. Instead of that, the judges enter the court, dressed in all sorts of ways, and often not neatly or well dressed, and the members of the bar, dressed equally badly, pay no attention to the judges when they come in. Some are sitting with their legs over the arms of their chairs, and some even salute the bench with the soles of their shoes, poised on the counsel table. This is too much democracy, even for democratic institutions.

The habit of judges wearing gowns is not universal, even in monarchical countries. The judicial members of the British Privy Council do not wear gowns; but it is to be added that their decisions do not seem to be held in the highest repute in Great Britain, though they are quoted in the United States equally with the House of Lords, through a mistaken understanding (as we take it) of their position in the judicial establishment in the British Empire. The truth probably is that our republican institutions would not be greatly shaken if the judges of our appellate courts should continue to come into court dressed in business



suits of every shape and color, as they now do; nor would we drift into all the ills of the effete monarchies if they came into court dressed in gowns, and if the bar, also well dressed, should rise and tender them a respectful salutation.

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**CONSOLIDATION OF THE ILLINOIS SUPREME COURT.**—This court, which, together with its records, has for so long been on wheels, holding sessions in three different divisions in the State, has finally been consolidated, so to speak, and holds its sessions now at the State capitol. When the court met for the first time under the new arrangement on the 5th of October, there was quite a ceremonial, the chief feature of which was an address to the court by Adolph Moses, of the Chicago bar, and also an address by Gen. Alfred Orendorff. These addresses were briefly responded to by Chief Justice Phillips on behalf of the court. The entire proceeding is given in the *National Corporation Reporter* (Chicago) for October 7, of which paper Mr. Moses is the editor. The following is the concluding part of the address of Mr. Moses:—

In conclusion, I desire to express the confidence of the bar of Illinois in the Supreme Court of this State. It is the bar from which went out a great President. Other statesmen and high officials left the bar of Illinois for the greater action at the capital of the nation. It is the bar, from which a patriotic President sent a wise counselor, and placed him at the head of the highest court in the world. It is this bar which is loyal to the court when it deserves it, and dares to criticise and arraign it, when in error.

The independence of the bar necessarily reserves to them a just amount of fair and honest criticism of the judicial work of the court, but that independence does not exclude the matured judgment of the bar that the court is discharging its high duties conscious of the great responsibilities and powers lodged in its hands by the people.

No man has been daring enough to fix a taint upon the courts of this State, nor successful enough to make the charge lasting, after honest investigation. The bar appreciates the patience and learning which must characterize a Supreme Court sitting in this great commonwealth, called upon to decide the grave conflicting questions incident to an enlarged civilization, and as long as the bar continues this confidence, the people will not waver in their trust.

In the language of the proclamation of the First Territorial Court, held in the Northwest Territory, I trust that this Supreme Court will ever be "a court for the administration of even-handed justice to the poor and to the rich, to the guilty and to the innocent, without respect of persons, none to be punished without trial by their peers, and then in pursuance of laws and evidence in the case."

The court, under the present law, now enters upon the fourth judicial period of its history. May great success and the lasting gratitude of the people accompany it. May I also be permitted to tender to each one of the judges of this Honorable Court my individual respect and good wishes for the future success of this tribunal, and for a large measure of usefulness and happiness for each single member of the court.

In his response to these addresses Chief Justice Phillips paid the following tribute to the bar: —

Wherever civilization exists, the pioneers are earnest advocates of liberty, free thought and free speech have always held the members of the bar to the front rank, and their opposition to tyranny and oppression has been recognized and noted by every philosophical historian who has attempted to write on the progress of liberty.

The benefit to a court of an able, efficient, fearless bar, is always recognized and appreciated and this bench is proud of the bar of Illinois and of its indefatigable research and recognition of duty, and the aid derived from that research and fair treatment of the court has been great and has been and is appreciated. It is not the province of this court to make laws or advocate change in legislation or reform, the legislative power is another body; but speaking with reference to the history of the judiciary of Illinois and the practice that has ever existed here, it may well be hoped that it will be long ere changes are made in the method of procedure and practice in our courts. In behalf of the court we extend our thanks for your kindly greeting.

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OPENING OF THE SUPREME COURT OF THE UNITED STATES.—The *Alabama Law Journal* prints the following:—

At the opening of the October term of the United States Supreme Court on Monday the 11th inst., there were 466 cases on the docket as against 616 at the beginning of the October term in 1896, of which 383 came over from the last term and 83 were added during the court's vacation. According to long usage, the first duty of the term was the official call upon the president, no other public business being transacted on that day. On Tuesday the argument of cases on the regular docket was begun. On the second Monday of the term, the 18th inst., the court will take up the hearing of cases advanced on the docket and assigned for that date, of which there are nineteen. The first of the assigned cases is that of the man Bram, charged with the murder of the captain, the captain's wife and the first mate of the barkentine Herbert Fuller, in July, 1896. Then come the eight-hour law cases from Utah; the case of the Pittsburg, Cincinnati & Chicago Railroad Company v. The State of West Virginia, involving the questions of taxation; the case of the United States v. The Joint Traffic Association, and others of less general importance. The first case on the regular docket for argument was that of the City of New Orleans v. The Texas & Pacific Railroad Company. Some of the cases coming over from the last term are of considerable importance, among them being the Nebraska maximum freight rate case, involving the right of a State legislature to fix a freight rate beyond which railroads cannot go in their charges; the Southern Pacific Railroad Company v. The State of California, the disposition of which will determine the title to several hundred thousand acres of land; the Westinghouse Air Brake case, involving the validity of patents of the Westinghouse Company for applying the air brake to long trains; and the case of the Interstate Commerce Commission v. The Alabama Midland Railroad Company, involving the long and short haul clause of the Interstate Commerce law.

## NOTES OF RECENT DECISIONS.

**CARRIERS: BREACH OF CONTRACT TO FURNISH CARS.**— In *Gulf &c. R. Co. v. Hodge*,<sup>1</sup> the Court of Civil Appeal of Texas hold that a carrier, for breach of contract to furnish cars to plaintiff, made with knowledge that he had a contract to deliver to others grain on board the cars at a certain price, is liable for the profit which he would have made but for such breach.

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**MURDER IN THE SECOND DEGREE: TRAIN WRECKING—SPECIFIC INTENT TO KILL.**— In *Davis v. State*,<sup>2</sup> decided in the Supreme Court of Nebraska, it appeared that the plaintiff in error was indicted for the murder of one Hambell, a passenger on a railway train, by displacing the fixtures of the railway track, thereby causing the wreck of the train and the instant killing of Hambell. It was held: (1) Whether the prisoner, in displacing the fixtures of the railway track, acted maliciously was a question of fact for the jury, to be determined from all the circumstances and facts in evidence in the case; (2) that the prisoner's statements as to the motives which induced him to displace the fixtures of the railway track, while competent evidence, were not conclusive in his favor, that he did not act maliciously; (3) that, in order for the killing of Hambell to be murder in the second degree it was not essential that the evidence should show that the prisoner was possessed of a specific intent to either kill or injure Hambell or any other person upon the train.

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**CORPORATION: PAYMENT FOR SHARES—PAYMENT IN PROPERTY AT A FRAUDULENT OVERVALUATION.**— In the case of *Larocque v. Beauchemin*,<sup>3</sup> the British Privy Council had before it the question of the validity of a payment for company shares in property, where the governing statute required payment to be made in cash. Article 4722 of the Revised Statutes of Quebec provides that "the capital stock of all joint-stock companies

<sup>1</sup> 39 S. W. Rep. 986.

<sup>2</sup> 70 N. W. Rep. 984.

<sup>3</sup> Reprinted in *Montreal Legal News*, Vol. 20, No. 10.

shall consist of that portion of the amount authorized by the charter, which shall have been *bona fide* subscribed for and allotted, and shall be paid in cash." It was held<sup>1</sup> where there is no fraud or simulation, and the transaction is in good faith, anything which is in law equivalent to a payment, or which would be in law, sufficient evidence to support a plea of payment, is a "payment in cash" within the meaning of this section.<sup>2</sup> It ought to be added that the action proceeded on the ground of fraud, and the evidence showed that the property turned into the company in payment for its shares had been so turned in at a fair valuation. The theory of this case is that there would be no reason in requiring the shareholder to hand over a check for his share, leaving the corporation at liberty to hand back a check in the same amount for the property turned in by the shareholder, the company having the capacity to buy and own the same; but their Lordships do not explain where a court gets authority to set aside a plain statute.

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**DEED: REVOCATION OF DELIVERY OF A DEED OF GIFT.**— In the case of *Robbins v. Roscoe*, lately decided by the Supreme Court of North Carolina, a deed of gift, signed and sealed, was delivered by the grantor, after execution, to a deputy clerk of court, with instructions to have it proved and registered before the clerk, who was then absent. Shortly after, and before probate, the grantor took the deed from the deputy, saying that he had changed his mind about the delivery of it, owing to some conduct of the grantee that displeased him. The grantee knew nothing of the deed until after its recall. The court held that delivery was complete on delivery to the deputy, an intent that title should then pass being shown by the grantor's remark on recalling the deed. Mr. Justice Clark dissented. The common sense of this question is evidently with the dissenting judge. Until the deed had passed into the hands of some one entitled to be regarded as the agent of the grantee, there was only an intent to deliver, but partially performed, and hence subject to revocation. It is exactly as though the grantor had executed the deed, delivered it to his own servant with directions to take it to the recorder's office and have it recorded, and had then countermanded the directions. It is a wonder that the majority judges

<sup>1</sup> Affirming the judgment of the Court of Review, Montreal, Q. R., 9 S. C. 73.

<sup>2</sup> The court followed Spargo's

Case, L. R. 8 Ch. 407, and declined to follow *Re Johannesburg Hotel Co.* (1891), Ch. 119, and *Oregum Co. v. Roper* (1892), A. C. 184.

did not cite the case of *Marbury v. Madison*,<sup>1</sup> where Chief Justice Marshall, in substance, decided the remarkable proposition that a deed may take effect before its delivery. In that case the President, John Adams, had issued a commission as justice of the peace of the District of Columbia to Marbury and placed it in the hands of his Attorney General to be delivered. Mr. Jefferson's Attorney General came in at midnight of March 3d and 4th, took possession of the office and refused to deliver the commission. Marshall held that it was delivered, although it had merely been placed in the hands of the President's own officer with intent that it should be delivered by him. Marshall was so blinded by his hatred of Jefferson and by his partisan zeal as to write a long opinion, in a case where he admitted that the court had no jurisdiction, and decided, among other propositions, the very absurd proposition, that the grantor of a deed delivers it by placing it in the hands of his own servant and directing him to deliver it, although he revokes the direction before the servant has executed it. The President is a political corporation, and the revocation of the order to deliver it by Mr. Jefferson stood in law exactly as though it had been made by Mr. Adams before his term expired. If, before midnight of March 3d, Mr. Adams had directed his Attorney General not to deliver the commission, no one would have put forward the proposition that, notwithstanding this direction, it was in theory of law delivered.

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**SENDING OBSCENE LITERATURE THROUGH THE MAILS.**—The decision of the Supreme Court of the United States in *Dunlop v. United States*,<sup>2</sup> though not important on account of any question decided, is gratifying on account of the result which it achieved. That result was to put in the penitentiary one of the vilest characters that ever infested any community, a publisher who, under the disguise of publishing a newspaper called the *Chicago Dispatch*, habitually levied blackmail upon whomsoever he could fasten upon. His practice was to employ detectives to search out and discover the weak points in the private characters of prominent individuals, men having money, and to write up sketches of them, and to send his creatures to them to exhibit and read to them those sketches, demanding a sum of money for withholding them from publication. For example, he found out that a prominent and wealthy business man had served a term in the penitentiary in early life. He prepared a sketch of his life, including, of course, this incident, and sent

<sup>1</sup> 1 Cranch (U. S.), 137.

<sup>2</sup> 17 Sup. Ct. Rep. 375.

one of his apostles of truth to exhibit it to the victim and demand a considerable sum of money for its suppression. The intended victim, however, put his pistol in his pocket and calling on the scoundrel at his editorial office, drew his weapon and boldly informed him that if he published the article he would be killed, and that nothing would be paid for its suppression; and it was not published. It is the duty of good citizens to deal with such fellows in that way; and it is the duty of the judges to give them the butt end of the law, as Judge Grosscup did in this instance. The Supreme Court of the United States can be relied on in cases of this kind to administer a wholesome criminal jurisprudence, and not to allow themselves to be tripped up with shallow technicalities. The gratifying opinion which was rendered in this case, and which covers a number of points of criminal procedure — because in these cases an appeal always puts the trial judge on trial, and never strikes at the real question of guilt or innocence — was written by Mr. Justice Brown. One of the points decided was that the production of a copy of the paper proved itself, *prima facie*, and that the legend thereon “by Joseph R. Dunlop” proved, *prima facie*, that the accused was its editor.

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**LIBEL: CHARGING THE JURY ABOUT THE HORSE-WHIP AND THE SHOT-GUN.**—In the case of *Bennett v. Salisbury*,<sup>1</sup> which was an action for a most atrocious libel, containing utterly false charges of licentious and scandalous conduct, the court, in charging the jury, told them that it was quite likely they would consider this as an atrocious libel, of a character which, in remoter regions, where respect for law does not prevail to the same extent, is frequently punished by an appeal to the horse-whip or shot-gunn. The Federal Circuit Court of Appeals saw no error in so charging the jury. That it was an atrocious libel was manifest, and was not denied. The context shows that the remaining part of the sentence was for the purpose of suggesting to the jury that an appeal to the courts of the country for reparation was not to be regarded as improper or unmanly. The remark, read in connection with the whole charge, was not of an inflammatory character. It was but the statement of a fact within common knowledge, and in substance amounted to no more than telling the jury that the plaintiff should rather be commended than prejudiced by choosing a judicial tribunal for redress. Instead of referring to remoter regions, the learned judge might have referred to remoter times in New York City

<sup>1</sup> 78 Fed. Rep. 769.

itself, when persons libeled in this manner were accustomed to horse-whip old Bennett, whereupon he would run down to his office and get out a flaming extra announcing his own disgrace and shame. This was newspaper enterprise. In our day it would be called a "scoop."

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**LIBEL: EXEMPLARY DAMAGES—GIVING EXEMPLARY DAMAGES BECAUSE OF INSUFFICIENT RULE FOR VERIFYING THE TRUTH OF LIBELOUS COMMUNICATIONS.**—In the case of *Bennett v. Salisbury*,<sup>1</sup> decided in the Federal Circuit Court of Appeals for the Second Circuit, it appeared that the proprietor of the *New York Herald*, who was the defendant in the action, was absent in Europe at the time of the publication of the libelous article, and it appeared inferentially that he had no knowledge of the plaintiff, and bore no malice or ill-will toward him, and that he did not personally authorize the publication of the libel. It also appeared that he had, within the jurisdiction of his city editor, which extended to a distance of 100 miles from New York City, with the exception of the city of Philadelphia, a great number of local correspondents, and that he had established a rule for the guidance of his city editor that communications libelous in their character, when received from some one unknown to him or to the editorial staff, were not to be published until the city editor had sent to the accredited correspondent of the paper at the place from which the communication came, and had been informed by him that it was accurate. The publication in the particular case was a shameful personal scandal, imputing sexual misconduct between the daughter of a clergyman in a small village in Connecticut and a prominent citizen of that place. It was sent by a person unknown to the editorial staff of the *Herald*, and the city editor immediately communicated with the *Herald's* local correspondent at the place, and asked him to verify it, and received the reply that it was true; whereupon it was published in the *Herald*. It was of so vile a character that it may fairly be said that a man who will publish such stuff before it has become the subject of a judicial investigation, whether it is true or false, ought, as General Jackson would have said, to have his ears cut off. The penitentiary is the only place for such creatures. The industry of making a living by printing, publishing and circulating such loathsome matter, is infinitely below that of the pimp or the prostitute. The judge charged the jury that they might properly consider whether the establishment of an inadequate rule for the verifi-

<sup>1</sup> 78 Fed. Rep. 769.

cation of items libelous in their character, was not evidence of that reckless indifference to the rights of others which would authorize them to give exemplary damages. The jury having returned a verdict for damages in the sum of \$5,000, it was held that this direction was correct. In giving the judgment of the court upon this point, Mr. Circuit Judge Shipman said:—

The subject of the care that shall be demanded from the large daily newspapers of the country in the investigation of the charges of misconduct or of crime which they publish in regard to persons who are comparatively unknown beyond the communities in which they live, has been, of late, frequently before judges and juries. It has become the course of business of newspapers of this class to receive announcements of this character from news bureaus and from numerous special correspondents who are scattered over the country, and it has been the custom of some daily journals to rely upon the good faith and accuracy of these correspondents, and to publish, in substance, whatever they sent over their own signatures, without further investigation into its truthfulness, and, in an action for libel, when the falsehood of the publication was manifest, to attempt to ward off the charge of recklessness by saying that the information was received and was published in the usual course of business. Neither judges nor juries have been satisfied with the sufficiency of this kind of care. It is so insufficient as to be justly regarded as the absence of care, and as recklessness with respect to the rights and reputations of strangers to the publisher. The excuse was itself regarded as indicative of a careless indifference to and ignorance of the obligations of an owner to use his property so as not to injure others.

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**DIVORCE AND ALIMONY: INDIGENT HUSBAND NOT ENTITLED TO RECOVER ALIMONY.**—In a former issue of this REVIEW<sup>1</sup> we referred to a decision of Judge Gibbons, of the Superior Court of Cook County, awarding alimony to an indigent husband in a divorce proceeding. We now learn from the *Chicago Legal News* that the decision of Judge Gibbons was reversed by the Appellate Court of Illinois for the First District. The case was that of *Groth v. Groth*. The decision of the court is printed in full in a late number of the *Chicago Legal News*. The opinion, which was written by Mr. Justice Gary, was briefly as follows:—

The appellant filed a bill to obtain a divorce from appellee. The court ordered that she should pay him twenty dollars per month temporary alimony and twenty-five dollars solicitor's fees, from which order is this appeal. We do not review the cause shown on which such order was made, being of the opinion that if alimony from a wife to a husband is a proper thing upon cir-

<sup>1</sup> 31 Am. Law Rev. 744.



cumstances, legislation is necessary to authorize it. At common law a husband was required to provide his wife with necessities but there was no reciprocal duty. The statute gives her—not him—alimony. To give it to him is not to administer existing law, but to make new law.<sup>1</sup> The order is reversed.

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**INJUNCTION: INTIMIDATION OF WORKMEN BY LABOR UNIONS.**—The decision of Mr. District Judge Sage, of the Circuit Court of the United States for the Eastern District of Ohio, supporting the right of an injunction against the striking members of labor organizations, to prevent them from intimidating workmen of the complainants, or preventing persons from entering into the employment of the complainants, is one of the most elaborate judgments upon the question which we have seen. It is in fact a thesis upon the subject.<sup>2</sup> According to the syllabus, an injunction will be granted where members of labor organizations conspire unlawfully to interfere with the management of the business of a corporation, and to compel the adoption of a particular scale of wages, by congregating riotously and in large numbers, at and near the works of the corporation, for the purpose of preventing persons not members of said organizations from entering the employ of the corporation or remaining therein, by intimidation, consisting in physical force, or injury, actual or threatened, to person or property. The jurisdiction of equity is not ousted because the acts complained of may also be the subject of indictment.

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**CORPORATIONS: OFFICERS — DELEGATION OF AUTHORITY.**—In the case of *Jones v. Williams*, often cited as *Jones v. Pulitzer*,<sup>3</sup> the Supreme Court of Missouri had occasion to consider the power of directors of a corporation to delegate to an executive officer the authority to place its property and business under the absolute control of a third party, and thereby divest themselves of the duty which the law has imposed upon them. The statutes of Missouri require that the property and business of a corporation, like the one under consideration (a publishing company) shall be controlled and managed by directors, and also authorize them “to appoint such subordinate officers and agents as the business of the corporation may require.” The court held that a contract whereby the president of a corporation was intrusted with the management of its entire business, did not amount to

<sup>1</sup> *Somers v. Somers*, 39 Kan. 132; name of the Consolidated Steel and Green v. Green, 68 N. W. Rep. 947. Wire Co. v. Murray, 80 Fed. Rep. 811.

<sup>2</sup> The case is reported under the <sup>3</sup> 89 S. W. Rep. 490.

a delegation of corporate rights and powers, but was a mere authorization of the president to perform, as agent for the corporation and in its name, the business which it was authorized to transact, and that it was not illegal.

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**CARRIERS OF PASSENGERS: LIABILITY OF RAILWAY COMPANIES WHERE TRAINS ARE HIRED TO EXCURSIONISTS — GENERAL LIABILITY OF CONNECTING ROADS IN SUCH CASES — PROTECTING FEMALE PASSENGER FROM INSULT AND ABUSE.**— In the case of *Collins v. Texas &c. R. Co.*,<sup>1</sup> the Court of Civil Appeals of Texas decided the following propositions:—

1. Where an association makes a contract with a railroad company for a certain consideration to transport excursionists over its road and another road for the benefit of both companies, both sharing equally in the profits, both companies are jointly and severally liable for damages occasioned by the neglect of either in the performance of duty imposed by law on carriers of passengers.

2. Where a railroad company hires its trains to an association for an excursion, the association selling the tickets to the passengers, the railroad company is liable if it fails to protect female passengers on the train from insult and abuse.

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**WILL: POWER OF APPOINTMENT — EXECUTING THE POWER BY DEVISING IN FRAUD OF CREDITORS.**— In the case of *Friedman v. Butters*,<sup>2</sup> the Supreme Court of Appeals of Virginia hold that where a testator willed his property to his wife during widowhood, with absolute power to dispose of it by will, which power the widow executed by devising the property to volunteers, leaving debts of her own unprovided for, the property so devised became a part of her estate on her death, subject to the claims of her creditors. The reason is that where a person has a general power of appointment, either under a deed or a will, and executes this power, the property appointed is deemed in equity to be a part of his assets and subject to the demand of his creditors, in preference to the claims of his voluntary appointees or legatees.<sup>3</sup>

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**COMMON LAW MARRIAGES.**— It seems that common law marriages are flagrant in Texas and some other American jurisdictions. What constitutes such a marriage, though a matter of common learning to

<sup>1</sup> 39 S. W. Rep. 648.

<sup>2</sup> 26 S. E. Rep. 845.

<sup>3</sup> Citing *Brandies v. Cochran*, 121

U. S. 344. Other decisions cited by the Virginia Court are to a similar effect.

the legal profession, may be a question possessing some curiosity to the uninitiated, and especially to the law student. In the case of *Simons v. Simons*, lately decided in the Court of Civil Appeals of Texas,<sup>1</sup> a common law marriage is thus defined by the court, speaking through Mr. Justice Williams: —

It is now definitely settled in this State that a marriage according to the common law is valid, whether the statutory regulations on the subject are observed or not.<sup>2</sup> To constitute such a marriage, it requires only the agreement of the man and woman to become then and thenceforth husband and wife. When this takes place, the marriage is complete. There are certain states of fact, which under the rules of evidence, are held to prove the existence of the marriage, that are sometimes mistaken for the marriage itself. Thus, recognition of and cohabitation with each other as man and wife are sometimes spoken of, and are spoken of in the charge in this case, as constituting marriage, when they are simply facts which go to prove the agreement or consent by which the marriage is so accomplished. Marriage may be proven by other evidence besides these facts, and on the other hand, the facts may exist when there is in truth no marriage.<sup>3</sup> There is a doctrine of the law which is sometimes treated as defining a marriage of a character distinct from that which is just explained, viz., that a promise of marriage, followed by carnal intercourse, of itself constitutes marriage. The doctrine is thus stated by Mr. Bishop: "It is that, where parties are under an agreement of future marriage, if then they have copula, which is lawful in the marriage state alone, they are presumed, in the absence of any showing to the contrary, to have arrived at the period of actual marriage, or to have transmuted their future to a present promise because the law always leans to the good, rather than the evil, construction of equivocal acts." Hence, in a form of expression common in the books, one of the methods of contracting marriage is said to be "*per verba de futuro cum copula*."<sup>4</sup> This doctrine, properly understood, only enforces the rule that a man and woman becoming husband and wife by consenting presently to so become, and that the promise, followed by the copula, simply prove such consent, in the absence of rebutting evidence. This is clearly shown by the author quoted.<sup>5</sup> A man and woman may be under engagement to marry, and may still have illicit intercourse, without becoming husband and wife; but the promise, followed by the intercourse, raises the presumption that the latter is lawful, and hence that the parties have consummated their engagement. The verdict and judgment in this case are evidently based upon the belief that the plaintiff and defendant were not husband and wife when the property was acquired. The evidence does not warrant such a conclusion. It shows, without contradiction, that the parties agreed to marry, and that they thereafter lived

<sup>1</sup> 39 S. W. Rep. 639.

<sup>2</sup> *Chapman v. Chapman*, 88 Tex. 641; 32 S. W. 871; *Id.* (Tex. Civ. App.) 32 S. W. 564; *Ingersoll v. McWillie* (Tex. Civ. App.), 30 S. W. 56; *Id.* (Tex. Sup.) 30 S. W. 869; *Holder*

*v. State* (Tex. Cr. App.), 29 S. W. 793; *Cumby v. Henderson*, 6 Tex. Civ. App. 519; 25 S. W. 673.

<sup>3</sup> *Lewis v. Ames*, 44 Tex. 319.

<sup>4</sup> 1 Bish. Mar. & Div., § 253.

<sup>5</sup> 1 Bish. Mar. & Div., §§ 253-259.

together, recognizing and treating each other as husband and wife. Under the principles stated, it must be held that they were married. Even if no promise were shown, the presumption of the innocence of their intercourse would apply, and, as the evidence stands, would admit of no other conclusion.<sup>1</sup>

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**FRAUDULENT CONVEYANCES: DEEDS OF TRUST AND SUBSEQUENT ASSIGNMENTS FOR CREDITORS WHEN CONSTRUED SEPARATELY.**—In *Hill v. Ryan Grocery Co.*<sup>2</sup> the United States Circuit Court of Appeals for the Fifth Circuit had occasion to consider a question which is frequently perplexing the State courts, and resolved it by holding that whether two instruments, in any case, shall be considered as one, and construed together, depends on the nature of the transaction; the relation of the writings to each other; the time of, and the circumstances attending, their execution; and, as applied to deeds of trust and assignments, executed pursuant to the Mississippi statutes, whether the one was made in support of the other, and had the taint of actual or constructive fraud. Applying this doctrine to the facts before them, the court held that where a deed of trust was accepted by the grantee as security for an actual indebtedness, in good faith, and in ignorance, until some hours later, of an assignment for benefit of creditors made by the grantor about the same time, the two instruments were to be regarded as separate and distinct, and that the trust deed was valid. This conclusion is enforced by a clear and learned opinion written by Mr. District Judge Maxey.

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**CONSTITUTIONAL LAW: ELECTIONS — DENIAL OF RIGHT OF SUFFRAGE TO WOMEN NOT A VIOLATION OF A CONSTITUTIONAL RIGHT.**—Some of the women who are struggling for the right of suffrage exhibit a great deal of courage, although it may not be properly blended with discretion. In the case of *Gougar v. Timberlake*,<sup>3</sup> recently decided in the Supreme Court of Indiana, the plaintiff sued the defendant and others, who constituted a board of election, for damages for denying to her the right to vote at the presidential election of 1896. The right was claimed upon constitutional grounds. Although, since the decision of the Supreme Court of the United States in *Minor v. Happersett*,<sup>4</sup> the subject must be regarded as somewhat hackneyed, yet in this case Mr.

<sup>1</sup> *Nixon v. Cattle Co.*, 84 Tex. 411; 19 S. W. 560; 1 Bish. Mar. & Div., §§ 487-489.

<sup>2</sup> 78 Fed. Rep. 21.

<sup>3</sup> 46 N. E. Rep. 389.

<sup>4</sup> 21 Wall. (U. S.) 162.

Justice Hackney, in giving the opinion of the court, entered into a long disquisition on the constitutional aspects of the question, and concluded in the following paragraph:—

We are not prepared to say, under the existing social conditions, considering the marked intellectual advancement of women since the adoption of the present constitution, that the elective franchise should not be given them. There are many questions to be settled by the ballot which would enlarge the sphere of freedom, would advance the morals and enlighten the burdens of humanity, would redeem homes from the wreckful influences of intemperance, and would stay the mad pace of partisan bias and corruption; but to what extent the ballot in the hands of women would tend to increase or to destroy their present great influence in the affairs of man, the home and the State, cannot be known in advance of the experiment. Whatever the personal views of the justices upon the advisability of extending the franchise to women, all are agreed that under the present constitution it cannot be extended to them. The judgment of the lower court, in sustaining the demurrer of the appellee to the appellant's complaint for damages in denying her the right to vote, is affirmed.

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**NATURALIZATION OF ALIENS: RIGHT OF DARK RACES TO AMERICAN NATURALIZATION.**—The right of a Mexican to be naturalized in this country seems never to have been determined until the recent case of *Re Roderiguez*.<sup>1</sup> In this case Judge Maxey decides that "whatever may be the status of the applicant viewed solely from the standpoint of the ethnologist, he is embraced within the spirit and intent of our laws upon naturalization."

The right of a Chinaman to be naturalized was denied in *Re Ah Yup*,<sup>2</sup> before Congress had expressly prohibited such naturalization. The right of a native of British Columbia of half Indian blood to be naturalized was also denied in *Re Camille*.<sup>3</sup> The same was decided in respect to a native of the Sandwich Islands whose ancestors were Kanakas, in *Re Kanaka Nian*.<sup>4</sup> A Japanese was denied naturalization in *Re Saito*,<sup>5</sup> and a dark yellow native of Burmah was rejected in *Re San C. Po*.<sup>6</sup> Except persons of African nativity or African descent, only "free white persons" can be naturalized under U. S. Rev. Stat.<sup>7</sup> Judge Maxey's decision is the first which extends the meaning of these words beyond their strict construction. — *Case and Comment*.

<sup>1</sup> 81 Fed. Rep. 337.

<sup>2</sup> 5 Sawyer, 155.

<sup>3</sup> 6 Fed. Rep. 256.

<sup>4</sup> 4 L. R. A. 726.

<sup>5</sup> 62 Fed. Rep. 126.

<sup>6</sup> 7 Misc. (N. Y.) 471.

<sup>7</sup> § 2169.

**THE ASSOCIATED PRESS'S NEWS MONOPOLY: JUDICIAL EXPRESSIONS OF OPINION THEREON IN THE UNITED STATES CIRCUIT COURT OF APPEALS.**—Our readers will recall the decision of Mr. Federal District Judge Lochren rendered about a year ago at St. Paul, in the United States Circuit Court in the case of the *Minnesota Tribune Company v. The Associated Press*.<sup>1</sup> The Tribune Company claimed an exclusive right to the news service of the Associated Press at St. Paul, under a contract with that corporation; whereas the Associated Press had admitted to its news service a rival journal published within the news field of the *Tribune*, called the *Minneapolis Times*. The object of the suit was to restrain the Associated Press from furnishing its news service to the latter paper in violation of its alleged contract with the plaintiff corporation. The court held, upon the construction of the contracts subsisting among the parties, that the plaintiff had failed to make out a case, and dismissed the bill. An appeal was taken to the United States Court of Appeals for the Eighth Circuit, sitting at St. Paul. Messrs. Munn and Thygeson represented the plaintiff, appellant, and Mr. Cohen represented the defendant. At the close of the argument Mr. Justice Brewer, who presided, made a suggestion indicating quite clearly his position relative to the monopolistic feature of the contract in controversy. Neither Mr. Munn nor Mr. Cohen, during their arguments to the court, in any way mentioned this feature of the contract; but, as the argument was about to close, Mr. Justice Brewer, in substance, said: "Before you close, Gentlemen, I want to call your attention to the question whether or not the contract in suit is a violation of the Anti-Trust Law." To this Mr. Cohen responded: "We do not desire to raise that question. The very life and existence of the Associated Press depends upon its exclusive or semi-exclusive character and the Associated Press does not desire to raise any such controversy." Mr. Justice Brewer then asked this question: "Will a court of equity, even though both parties consent, enforce a contract which manifestly creates a monopoly?" The case was finally decided on Monday, November 22d, at St. Louis, Mr. Circuit Judge Thayer writing the opinion of the court. The judgment of Mr. District Judge Lochren was affirmed. The ground of affirmance was somewhat different from that upon which the case had been decided in the court below; but the opinion contains what the profession are entitled to regard as a strong intimation that, if this ground had not been sufficient for the government of the case, the court would have affirmed the judgment on the ground that the court

<sup>1</sup> 77 Fed. Rep. 354.

of equity will not lend its aid to the support of a monopoly. In concluding the opinion of the court, Mr. Circuit Judge Thayer used the following language:—

If we had not reached the conclusion heretofore announced that the bill of complaint was properly dismissed, we should then feel compelled to consider a further question which is not touched by the briefs nor by the oral arguments, and that is whether a court of equity should in any event, undertake to specifically enforce and perpetuate a monopoly of the news, by limiting the service of news reports to a single newspaper in a large city and placing it within the power of the proprietor of such newspaper to prevent other newspapers from having access to the same sort of information. The fact that the counsel have not seen fit to raise or discuss this question, and the fact that the bill was dismissed on other grounds, renders it unnecessary to consider it or to express an opinion thereon.

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**INJUNCTION: RESTRAINING TICKET BROKERS FROM SELLING UNUSED PORTIONS OF RAILWAY TICKETS.**—Another advance of equity jurisprudence is made by the decision of Judge Clark in the United States court at Nashville, Tennessee, granting an injunction to prevent scalpers from buying, selling, or otherwise dealing in return coupons of non-transferable round-trip tickets. The question arose in respect to special tickets sold for the Nashville Exposition at one-third the usual rates, with a clear and distinct agreement that they should not be used except by the original purchasers. The scalpers were dealing in the return coupons and some of them were aiding the purchasers to deceive the railroad companies and obtain transportation by falsely claiming to be the original purchasers. On account of this some of the leading railroads had refused to continue to sell the low rate tickets and others were threatening to do the same. The success of the Exposition was to some degree involved in the effort to break up this fraudulent traffic of the scalpers. Actions at law against the scalpers were plainly an inadequate remedy.

As to the novelty of such an application for an injunction, the court says: "This argument carried to its full logical result would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is indeed an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well-known history of the subject. Of course, this contention has been overruled and precedent after precedent established from time to time to meet new conditions and to do full justice, until the

argument has long since lost most of its force, although it is still maintained in form.

The injunction was not granted against the business of scalpers generally, but "only in respect to the centennial low-rate tickets duly signed by the original purchaser in ink and not in pencil and not by initial."— *Case and Comment*.

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**FRAUD: SALE OF BONDS — FALSE REPRESENTATIONS THAT BONDS ARE FIRST MORTGAGE BONDS — LIABILITY OF PERSONS MAKING REPRESENTATION.**— In the case of *Bank of Atchinson County v. Byers*,<sup>1</sup> decided by the Second Division of the Supreme Court of Missouri, in May last, the court had to deal with a question which has been before the English and American courts in a good many cases. The question has arisen with reference to prospectuses put forth by the promoters or directors of corporations, making certain representations respecting the value of the shares of such corporations, intended to induce the public to purchase the shares. It has also arisen with reference to prospectuses put forth making representations intended to induce the public to become purchasers of corporate bonds; and it is now applied in a case where the representations were printed in the form of indorsements upon the bonds themselves. The doctrine announced by the courts in these cases, and agreed upon with some slight dissent, is to the effect that, where a man puts forth a lie and circulates it before the public, intending to deceive anyone whom his bait may catch, into investing in corporate shares, bonds, or any other commodity, and the lie does catch and deceive someone to his damage, the latter has an action for damages, on the footing of deceit, against the person putting forth and circulating the lie, irrespective of the question whether such person intended to deceive the particular person who in fact was deceived. The leading case on the subject, it will be recollected, is *Derry v. Peek*.<sup>2</sup> In that case Lord Herschel laid the law down thus, in language which the Supreme Court of Missouri now quote and approve:—

I think the authorities establish the following propositions: First. In order to sustain an action for deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly. Fraud is proved when it is shown that a false statement has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have

<sup>1</sup> 41 N. W. Rep. 325.

<sup>2</sup> 14 App. Cas. 374.



no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly. If fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there is no intention to cheat or injure the person to whom the statement is made.

The case also enforces, with a considerable citation of judicial authority and with very clear and cogent reasoning, the proposition that, where the representation which is put forth is plainly false, or where it is put forth without knowledge or reasonable ground for believing that it is true, the person who puts it forth is presumed to intend the natural consequences of his act; which results in the conclusion that he intended to defraud anyone whom his false representation might catch, including the person suing him for the deceit.<sup>1</sup> The application of these principles to the case at bar had the effect of holding certain persons who had negotiated certain bonds, which carried the indorsement that they were *first mortgage* debenture bonds, to persons believing that they were such; whereas only a portion of them were used in clearing off the first mortgage, and as to the balance they remained second mortgage bonds,—liable to the purchaser of such bonds for the damages sustained by him through their deceit in putting forth this false and fraudulent representation, inducing him to become a purchaser of the bonds. The opinion is written by Mr. Justice Burgess. It is excellent in matter and in manner, and tends to enhance the solid reputation which that excellent judge is building up. It is concurred in by Gantt, P. J., and Sherwood, J.

<sup>1</sup> Among the cases cited by the Court to this effect are: *Cowley v. Smith*, 46 N. J. L. 380; *Dulaney v. Rogers*, 64 Mo. 203; *Snyder v. Free*, 114 Mo. 375; *s. c.* 21 S. W. Rep. 847; *Babcock v. Eckler*, 24 N. Y. 623; *Clark v. Edgar*, 84 Mo. 110; *Bruff v. Mall*, 86

N. Y. 200; *Morgan v. Skiddy*, 63 N. Y. 319; *Bartholomew v. Bentley*, 15 Ohio, 659; *Clarke v. Dickson*, 6 C. B. (N. S.) 458; *Railroad Co. v. Kisch*, L. R. 2 H. L. 100; *Nash v. Trust Co.*, 159 Mass. 440; *s. c.* 34 N. E. 625.

## CORRESPONDENCE.

## AN EXPLANATION ABOUT THE SUGAR TRUST CASES.

*To the Editors of the American Law Review:*

I have naturally read with much interest the article in the July-August number of the REVIEW on the Sugar Trust cases, with six of which I had to do as United States Attorney for the District of Columbia; and I deem it my duty to ask the opportunity to correct an impression likely to have been created by the writer's quotation from the words of Senator Allen in debate in the Senate on July 6th, 1897.

Having spoken of the trial of Chapman before Mr. Justice Cole, which trial resulted in conviction, and having also in the debate alluded to Mr. Justice Cox, another member of the Supreme Court of the District of Columbia, Senator Allen said, as correctly quoted in the article: "Finally Chapman went to jail as a consequence of his violation of that law. That was not altogether to the satisfaction of Mr. Havemeyer and his other associates. By some means unknown to me, Sir, a change of forum took place. Cole and Cox were set aside, and a judge by the name of Bradley appeared on the Bench to try the remainder of the indicted persons. They were put upon trial and acquitted as rapidly as the cases were called and the juries could be impaneled."

Senator Allen's plain insinuation is that there was some improper change of forum in the premises. The simple truth is that the Supreme Court of the District of Columbia, which consists of six justices, has an annual assignment of the justices made in January of each year; and Justice Cole happened in due course to be holding a criminal court when Chapman was tried, and when the other defendants were tried both Chief Justice Bingham and Justice Bradley happened to be holding criminal courts. The assignment under which the justices last named were so holding criminal courts was made by due order of the entire court in that behalf on January 4th, 1897. Chapman's case was decided by the Court of Appeals of the District of Columbia on the demurrer January 7th, 1895.<sup>1</sup> The rulings of Justice Cole on the merits in that case were affirmed by the Court of Appeals of the District of Columbia April 7th, 1896.<sup>2</sup> Chapman's appeal to the Supreme Court of the United States was dismissed by that court November 30, 1896,<sup>3</sup> and his petitions for the writs of habeas corpus and certiorari in that court were finally refused by it April 19th, 1897.<sup>4</sup> A former petition of Chapman for habeas corpus was denied by the Supreme Court of the United States February 4th, 1895.<sup>5</sup>

It thus appears that when the Supreme Court finally disposed of Chapman's

<sup>1</sup> 5 D. C. App. 122.

<sup>2</sup> 8 D. C. App. 302.

<sup>3</sup> 164 U. S. 436.

<sup>4</sup> 106 U. S. 661-721.

<sup>5</sup> 156 U. S. 211.

case the justices of the Supreme Court of the District of Columbia had, for more than three months, been holding the courts to which they had been respectively assigned by the order of assignment of January 4th, 1897, and when I called for trial the cases of the other Sugar Trust defendants I had to choose between Chief Justice Bingham and Justice Bradley; and, following the practice and observing the proprieties of the situation, I applied first to the Chief Justice, who, in addition to being the Chief Justice, was holding the branch of the criminal court designated as Division No. 1; and the Chief Justice, being in temporarily infirm health and foreseeing the magnitude of the labor entailed by the trial of the cases, asked to be excused from their trial and that Justice Bradley be requested by me to try them.

In this way, and in this way only, it happened that the cases were tried by Justice Bradley instead of by any other member of the court. Until after my request of the Chief Justice in the first instance and of Justice Bradley in the end, no other member of the court, and no one of the defendants or their counsel knew before which of the two justices the cases would be called; and after it was settled by the Chief Justice, Justice Bradley and myself that the cases were to be tried by Justice Bradley, it was not within the power of the defendants or their counsel or any other justice of the court to change the forum; and the most that could have been done by any of the defendants or their counsel was to apply for a postponement, and to have changed the forum, fixed as above related, a postponement beyond the current year would have been necessary. Such a thing was not attempted, and if attempted would have been futile.

I make this communication from a sense of right and wholly without color as respects any opinion that may be had as to the merits and proprieties, or the contrary, of the conduct of the trials; and as the writer of the article in the Review refers to a letter received from me, I take pleasure in sending you a copy of the same, to be printed by you in connection herewith, if in your judgment desirable.

Yours respectfully,

HENRY E. DAVIS.

WASHINGTON, D. C.

[The letter above referred to was merely a history of the cases, without any criticism of the court or its rulings, and its publication does not seem necessary. — EDS. AM. LAW REV.]

## RIGHT OF DIRECTORS TO PREFER THEMSELVES AS CREDITORS.

*To the Editors of the American Law Review:*

Is not the criticism in your September-October number of *Butler v. Harrison & Co.*,<sup>1</sup> not only erroneous, but even conceding the contention to be correct, that the funds of an insolvent corporation are strictly a *trust* fund for *all* creditors, too harsh, viz., that these directors in particular acted against "good conscience and common honesty."

They had advanced money (\$100,000) in good faith to assist and carry on the

<sup>1</sup> 41 S. W. (Mo.) 225.

business of the company. Being directors and knowing the condition of the company, they would not have done this and increased their investment in it unless they had a confident expectation that these loans would have extricated the company from its difficulties and enabled it to pay all its debts. When this failed they suspended operations and remained in this condition for four years; having practically paid all the debts of the company except that held by Butler, of which they knew nothing, till just before they secured themselves. During these four years Butler could have filed a creditor's bill asking the appointment of a receiver and the application of the funds of the company to *all* its creditors. On the contrary, he remained quiet, for four years and till the directors were about to sell the property of the company to a new company, in order to pay the debt due to them from the proceeds. The new company was, it is quite true, composed of the directors who had loaned the old company the money, and when they made the transfer of the property they knew of Butler's claim (\$2,200, about). Butler still did not file a bill for the fair and just distribution of the assets of the company, but obtained judgment at law for his debt, and then brought a bill to set aside the conveyance to the new company, and thus to give priority to his claim of \$2,200 over theirs of \$100,000. Would that have been either fair or just? Were not the directors perfectly justified in protecting themselves as far as the law allowed them? The court dwells on this fact, that Butler was not seeking, as he could even then have done, a fair and just distribution of the company's assets; but a preference over all other creditors and refused it. It seems to me that the Missouri court in this case simply followed the law laid down by its great jurist who has closed the century with the monumental law book of the day: "We therefore find the prevailing doctrine to be that the director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security and may enforce the same like any other creditor, but always subject to severe scrutiny and under the obligation of acting in the utmost good faith."<sup>1</sup> The equity of the directors was surely equal to that of Butler. Why, then, should a court of equity set aside one of its fundamental principles, "when there is equal equity the law must prevail," and give preference to one who was seeking to do injustice? And, too, how does the case differ from *Ketchum v. Duncan*?<sup>2</sup>

Respectfully,

H. E. YOUNG.

CHARLESTON, S. C.

REMARKS.—The writer of the work above alluded to has never advocated in that work, nor in any other public print, the doctrine that the directors of a business corporation may rightfully prefer themselves as its creditors over its outside creditors. The language above quoted bears no such construction. The writer was dealing with their power to make *present advances* to the corporation and to take a *present security* therefor. In the immediately preceding sentence of the very same section the writer uses this language: "Nor should it be forgotten that the right of directors of an *insolvent corporation* to take

<sup>1</sup> Thompson Corporations, Sec. 4063.

<sup>2</sup> 96 U. S., p. 665.

security for *past advances*, thereby *preferring themselves* over other creditors, stands on quite a different footing." The italics, as above used, are so used in the book. In volume V. of the same work<sup>1</sup> the same author devotes a chapter to the subject of the power of insolvent corporations to prefer their creditors, a portion of which is devoted to combating the doctrine that the directors of an insolvent corporation can prefer themselves as creditors. The directors of a corporation are always shareholders. They are hence *proprietors*. When they induce strangers to give credit to the corporation they do it for their own benefit and profit. Their position toward such strangers is, in substance, sense and justice, that of *partners*; and the doctrine that they should be allowed to prefer themselves, in the event of the insolvency of the corporation, over outsiders whom they have duped into giving it credit, is just as iniquitous as it would be to allow partners so to prefer themselves out of the partnership assets over the creditors of the corporation.

It is possible that there were circumstances connected with the case of *Butler v. Harrison &c. Co.*, which did not commend the case to the favorable consideration of a court of justice. But it is not true, as supposed by our correspondent, that "during these four years Butler could have filed a creditors' bill, asking the appointment of a receiver and the application of the funds of the company to *all* of its creditors." Butler could not, under the laws of Missouri, have maintained a creditors' bill until he had recovered a judgment at law. He had a subsisting contract with the Nova Scotia Iron Company, under which he had the right to certain royalties upon ore in his bank whether the company mined any or not. Those royalties were running in his favor by the mere efflux of time. He knew it and the directors of the company who preferred themselves as its creditors knew it. He was under no obligation to stir himself while this contract, which they had voluntarily made with him, was running in his favor. He had a right to wait as long as he did, and then sue for all past royalties which had accrued and which the company did not pay, and recover the judgment which he did recover. The recovery of the judgment concluded all inquiry as to antecedent laches.

The argument that Butler did not file a bill for the fair and just distribution of the assets of the company, but obtained judgment at law for his debt, and then brought a bill to set aside the conveyance to the land company, and thus giving priority to his claim of \$2,200 over theirs of \$100,000, besides begging the question, proceeds on grounds

<sup>1</sup> §§ 6492, *et seq.*

which are entirely illusory. In the first place, *there were no other creditors*. The opinion of the court shows that. The whole argument in the opinion of the court that in such a case a creditor must, under the trust fund doctrine, proceed, not only for himself but for all other creditors, is an argument directed to some case in the clouds. What sense would there be in requiring Butler to say in his bill that he filed it for all other creditors, knowing that there were no such creditors? The course which Butler took of levying his execution upon the land, selling it, buying it in, and then bringing the suit in equity to remove the obstruction from his title, is one allowed by the laws of Missouri, unless this decision, or some other very recent decision, has changed that law. The right of a judgment creditor, under such circumstances, to file a bill for himself to enforce his lien upon the property of the debtor, wrongfully conveyed, is recognized in equity procedure, and the doctrine is applied in such cases that equity favors the diligent and not the sleepy. He is not obliged to shake the tree and allow somebody else to come in and help him to pick up the fruit. The statute law of Missouri indicates the policy of the State of Missouri on that subject in its relation to corporations. The judgment creditor of an insolvent corporation may proceed by motion for an execution against one of its stockholders, without joining all and without proceeding for all creditors; and he may, in like manner, bring an action against one of its stockholders. These statutes indicate that the policy of that law has never been to shoulder a single creditor with the obligation of bringing a general winding-up bill. If he were required to do this, it would be tantamount to a denial of justice, especially in the case of a small creditor. He ought not to be thrown out of court for failing to assert the rights of a party that does not see fit to assert his own rights. Especially he ought not to be thrown out of court on the mere speculation or theory that he has not brought suit for other creditors, when no such creditors exist.

The decision in *Butler v. Harrison &c. Co.* was rendered by the First Division of the Supreme Court of Missouri. The whole court consists of seven judges. The First Division consists of four judges. The decision was participated in by four judges. All of them concurred in the result, but only two of them concurred in the grounds stated in the opinion. The case undoubtedly decides that the directors of a corporation may prefer themselves as its creditors over its outside creditors. Beyond that it has little value as an authority.

It is proper, however, that a misapprehension with regard to this case should be corrected. It has been stated in some of the public prints

that the three directors, who preferred themselves as creditors, were at the time the sole stockholders. This was not strictly true. There were six or seven stockholders when the corporation was originally organized, and some stock was held by others than these three directors at the time when it was wound up. But we have been told by a gentleman in a position to know, that at the time when the conveyance assailed by Butler was made to the three directors named, they held substantially all the stock. We cannot see that their position should be regarded, in the eye of a court of equity, which looks to the substance of things, in the slightest degree different from that of partners who undertake to prefer themselves as creditors, in respect of past advances, out of the assets of the partnership, it being insolvent, in advance of its outside creditors. Such a doctrine, in respect of partnership, has never been listened to in a court of justice.

What we have written upon this question has not been intended in any way to reflect on the Supreme Court of Missouri. The writer of this note feels a pride in that court and a sense of allegiance to it. The judge who wrote the opinion of the court in *Butler v. Harrison &c. Mining Co.*, is the youngest judge on that bench, both in years and term of service. He is capable, faithful, and industrious, and is making an excellent record. It is not a question of men, but a mere question of legal doctrine; and it is no more than fair to say that several enlightened courts take the same view of the question which is taken by the Supreme Court of Missouri.

## BOOK REVIEWS.

**RULING CASES, VOL. XII.**—Ruling Cases, arranged, annotated and edited by ROBERT CAMPBELL, M. A., of Lincoln's Inn, barrister-at-law, advocate of the Scotch bar, and late Fellow of Trinity Hall, Cambridge, assisted by other members of the bar. With American notes by IRVING BROWNE, formerly editor of the American Reports and the Albany Law Journal. Vol. XII. Executor—Indemnity. London: Stevens and Sons, Limited. Boston, U. S. A.: The Boston Book Co., Law Publishers and Booksellers. 1897. pp. 845 and xxxii.

The Table of Contents of this volume presents a great variety of topics: *Executor, Executor De Son Tort, Extradition, Family Arrangement, Ferry, Fishery, Fixtures, Foreign Enlistment, Fraud, Fraudulent Conveyance, Fraudulent Preference, Freight, Gaming and Wagering, Gift (inter vivos), Goodwill, Guarantee, Habeas Corpus, Hawker and Pedlar, Highway, Husband and Wife (including Marriage, Property, Divorce and Separation), Illegality, Impossibility, Indemnity.*

Most of these subjects are both interesting and practical. In examining this volume we are again impressed with the *Rules* with which the cases are introduced. They state with remarkable clearness and brevity the principles deduced from the cases. We do not know how they could be made better.

The subjects in this volume do not call for so many extended notes as those in some of the volumes of this series. We notice in particular, however, quite long and carefully written notes by both the English and American editor on the subject of *Gift inter vivos*. The volumes of this series of Reports are a delight to the eye and to the touch; the type is so clear and the paper so good.

**TAYLOR ON EVIDENCE, CHAMBERLAYNE'S EDITION.**—A Treatise on the Law of Evidence as administered in England and Ireland; with illustrations from Scotch, Indian, American, and other legal systems. By his honor the late Judge Pitt Taylor. Ninth edition (in part rewritten). By G. PITT-LEWIS, Q. C., with notes as to American Law by CHARLES F. CHAMBERLAYNE. In three volumes. London: Sweet and Maxwell, Ltd., 8, Chancery Lane. Boston, Mass.: The Boston Book Company, Law Publishers. 1897. Three vols. Price, \$13, net.

It is quite unnecessary to say anything about Judge Taylor's Treatise on the Law of Evidence either by way of recommendation or criticism. In his preface to the first edition published in 1848 Judge Taylor said: "The following work is founded on Dr. Greenleaf's American Treatise on the Law of Evidence. Indeed, when in July, 1848, my attention was first especially drawn to the subject of Evidence, with a view to publication, I undertook to discharge the duties of an editor only, and it was not until I had been engaged for many months in that undertaking that I finally determined to abandon it, and to submit to the public a treatise of my own. \* \* \* I have still, however, availed myself very largely of Dr. Greenleaf's labors, having adopted, with but few alterations, his excellent general arrangement, having followed to a considerable extent the



course even of his sections, and having borrowed many pages of his terse and luminous writing."

This work has been in general use in England for half a century lacking a single year; and the ninth edition, which was recently issued there, is now reproduced page for page and line for line, with very important additions in the form of American Notes by Mr. Chamberlayne. These notes are at the end of the English chapters, and are intended to present and do present the American law of Evidence very fully. The extent of the work done by the American is in some measure shown by the fact that his notes cover nearly seven hundred pages, and these pages are more compactly printed than are those of the English text. There are nearly ten thousand cases cited in the original work, and almost half this number in the American notes. In some of the chapters the American notes occupy more space than the English text. Some of the more important notes are on the following subjects: Matters judicially noticed, forty pages: Presumptive evidence, fifty-two pages: Evidence confined to points in issue, fifty-four pages: Best evidence, twenty-four pages: Hearsay evidence, fifty-two pages: Shop books and Accounts, thirty-six pages: Confessions, twenty-eight pages: Parol evidence affecting written instruments, twenty-eight pages: Competency of witnesses, twenty-six pages: Examination of witnesses, fifty-six pages: Public documents, fifty pages: Private writings, sixty-seven pages.

The notes are divided by catch words in different type, so that it is easy to find any subdivision of the matter treated of. Care has been taken to include the latest decisions. In short, Mr. Chamberlayne's work seems to have been done with great care and completeness, and is a worthy supplement to Judge Taylor's work.

**COMMON LAW PLEADING: ITS HISTORY AND PRINCIPLES.**—Including Dicey's Rules Concerning Parties to Actions and Stephen's Rules of Pleading. By R. ROSS PERCY, of the Bar of the District of Columbia; Lecturer on Common Law Pleading in the Georgetown (D. C.) University Law School. One Volume, about 500 pages. Octavo. Law Sheep. \$3.50 net. Boston: Little, Brown, & Company. 1897.

The plan and scope of this book are best stated by the author in his Preface: "In my experience as a lecturer to students upon Common-Law Pleading, I have felt the need of a text-book containing the discoveries (for such they may be properly called) upon the subject made in the last twenty-five years by such men as Pollock and Maitland in the mother-country, and Bigelow, Holmes, Thayer, Ames, and others among ourselves. I have here endeavored to gratify that need. The fundamental principles of the common-law with respect to actions can never be better stated than they have been by Chitty. Stephen has performed a like task for the rules of pleading, while Dicey has embraced the law governing the selection of the parties to an action in an admirable series of rules. These three treatises have been, so far as was practicable, combined here, and the language of their authors has been used with the fewest possible modifications. Free use has been also made of the third book of Blackstone's Commentaries. Therefore this work, if I may venture to give it that name, pretends to be only a restatement in a condensed form of what has been said upon its subject by many authors in many books. Indeed, wherever the language of the particular author seemed to be the most appropriate it has been adopted. The only scope for original writing upon this subject is in the line of

discovery followed by the distinguished men whom I have already named; this path is necessarily closed to the lawyer in active practice at the bar."

This book is primarily intended for students, and it is admirably adapted to teach the principles of pleading as a science. It is also a book that a lawyer in practice, especially in the early years of his professional life, will find of great value; for while it develops the principles of pleading it is at the same time a work of great practical use, by reason of the rules, examples and suggestions which are found all through the book.

**SCHOULER ON BAILMENTS.** *Third edition.* A Treatise on the Law of Bailments, including Carriers, Innkeepers and Pledge. By JAMES SCHOULER, LL.D., professor in the Boston University Law School, and author of treatises on the "Law of the Domestic Relations," "Wills," "Personal Property," and "Executors." Third edition. Boston, Little, Brown, and Company. 1897. Octavo. pp. 782 and lxxiv. Price, \$6.00.

Mr. Schouler now presents the third edition of his well-known treatise on Bailments. It is ten years since the second edition appeared, and decisions upon the subjects treated of, have in these years been rendered in great numbers. It was not within the plan of the work to present an exhaustive collection of cases, for to do that would require a separate treatise upon each of the several divisions of the general subject of Bailments. The author has cited the leading cases and in this way has added about five hundred cases more than the last edition contained; and altogether the present edition cites about thirty-nine hundred cases. The work covers a broad field in the law and, being clearly written, is admirably adapted for the use of students.

The work is divided into seven parts: I. Bailments in General. II. Bailments for the Bailor's Sole Benefit; or without Benefit to the Bailee. III. Bailments for the Bailee's Sole Benefit. IV. Ordinary Bailments for Mutual Benefit. V. Exceptional Bailments for Mutual Benefit. (Postmasters and Innkeepers.) VI. Exceptional Bailments for Mutual Benefit. (Common Carriers.) VII. Carriers of Passengers.

**ALGER'S LAW OF PROMOTERS—A TREATISE ON THE LAW IN RELATION TO PROMOTERS AND THE PROMOTION OF CORPORATIONS.**—By ARTHUR M. ALGER. Boston: Little, Brown, and Company. 1897. One vol. Octavo. Law sheep. pp. 303 and xxviii. Price, \$4.00 net.

Mr. Alger, of the Massachusetts Bar, is known at home as a learned and accurate lawyer, and the readers of the REVIEW may remember an able article by him some years ago on a matter of Corporation law; but he will be widely known henceforth through the carefully prepared treatise which he now submits to the profession. The subject deserves a fuller treatment than any work on the general subject of Corporations can accord to it, and in these days of many corporations and many promoters, it is desirable that the lack of any American work on this subject should be supplied.

The cases upon this subject are not numerous though generally quite important. About nine hundred cases are cited. Many of them are decisions of the courts of England; for the subject has been a more prominent one in the English courts than in the American. The cases not being very numerous, the author is able to examine, compare and analyze them in considerable detail. Such a subject is an ideal one for a legal author, for he can be exhaustive in treatment,

and can make his pages readable, because of the facts he can set forth which make up the little stories of the cases. Mr. Alger has made good use of his interesting material. He has clearly stated the principles of law deducible from the cases, and he has presumably stated all the law of the subject worth knowing down to date. The chapter titles are as follows: I. Nature of Promotership and Relation of Promoters to the Corporation; II. Duties of Promoters to the Corporation. III. Accountability of Promoters to the Corporation for Profits, Gifts and Commissions. IV. Measure of Profits Recoverable by Corporation. V. Breach of Duty or Fraud by Promoters as Ground for Recovery of Damages from them by Corporation, and for procuring the setting aside of executed Contracts entered into by it. VI. Suits by Shareholders to compel Redress for Wrongs by Promoters to the Corporation. VII. Liability of Promoters to account for Profits, Commissions and Gifts, or in Damages to Shareholders of the Corporation. VIII. Liability of Promoters to Subscribers for Shares in a Projected Corporation which proves abortive. IX. Remedies of Subscribers for Shares against Corporation when misled by Misrepresentations made by Promoters or by their Non-disclosure of Material Facts. X. Rights and Liabilities of Corporation on Promoters' Contracts. XI. Rights and Liabilities of Promoters under Contracts made by them, or by their Copromoters, in behalf of or for the Benefit of a Projected Corporation — Contracts between Promoters. XII. Rights and Liabilities under Contracts made by Promoters claiming to be incorporated when the Proceedings taken to incorporate have been Defective or Illegal.

GENERAL DIGEST, ANNOTATED, VOLUME III., NEW SERIES.—Rochester: Lawyers' Co-operative Publishing Company. 1897.

The publishers of this great work have been lately advertising "The Century's Law Without a Cent of Cost," and the profession have possibly not caught on to their exact meaning. What we understand them to be doing is this: In their annotated reports called *Lawyers' Reports Annotated*, they make exhaustive notes on questions of law. Then, in making up their digest, when they find a proposition decided which is covered by cases in some of those notes, they collect those cases under the paragraph in the digest, thus giving the person using the digest references to all other cases in point. A single paragraph, which we clip from a specimen sheet, will illustrate this:—

"§3. A statute prohibiting barbers to carry on business after 12 o'clock on Sunday or on a legal holiday, and applying to no other class of labor, is unconstitutional as special, unjust, and unreasonable, working an invasion of individual liberty, since it is based upon no distinction to justify singling out that class of laborers. *Ex parte Jentsch*, 32 L. R. A. 664, 112 Cal. 468, 44 Pac. 803.

"[Sunday. Prohibition of particular business on as class legislation: See also *Leiberman v. State*, 26 Neb. 464; *Bagio v. State*, 86 Tenn. 272; *People v. Bellet*, 99 Mich. 151, 22 L. R. A. 696; *Theisen v. McDavid*, 34 Fla. 440, 26 L. R. A. 284; *People, Hobach v. Kings County Sheriff*, 13 Misc. (N. Y.) 587.]"

Every lawyer who uses a digest in collecting the materials for his briefs will appreciate the value of this. It saves him the labor of going to other works to find the concurrent cases. That search is made for him gratuitously by the

publishers of this digest, and the cases are collected and placed under his very eye; so that, with the digest open before him, he has only to go to the shelves, take down the reports and examine them.

Outside of this, it ought to be said that the General Digest has had a steady evolution, and has steadily progressed toward substantial perfection, so much so that little is now left to be desired. It covers all the reported decisions of all the courts in the United States; those of the highest courts of England, which deal with topics of value to American judges and lawyers: those of the Supreme Court of Canada; and it also collects many important cases from other Canadian courts. It does not digest any case in its finally bound volumes which has not been officially reported; consequently, it gives no decision which is liable to be set aside or to be overturned on a motion for rehearing. It also refers to all the unofficial publications in which every case which it digests has appeared. It has a valuable table of cases criticised,—a feature which should not be omitted from any digest. It is a work which every thorough lawyer will have; and no thorough lawyer who has become accustomed to it will do without it.

**AMERICAN DIGEST, CENTURY EDITION, VOLUME I.**—Century Edition of the American Digest: A Complete Digest of all Reported American Cases from the Earliest Times to 1896. Volume I. *Abandonment—Advocate*. St. Paul: West Publishing Company. 1897.

The first volume of this great work contains 2,598 columns which indicates 1,299 pages of imperial octavo text, printed in small type. It is impossible, in the limits which we have at command, to give any detailed description of it; nor could we possibly say too much in its praise. The publishers have for many years been making practically an annual digest of all of the decisions of all of the American courts, and in that way have developed a system of doing such work in the hands of a corps of very capable men. What they now attempt is the publication of a work which will entirely supplant the old United States Digest and which will do much more than bring that work down to the present time; for that work did not, at least at any recent period, purport to be a digest of *all* the decisions of all the American courts. This work does. The publishers and their able editors have devised a drag-net which covers the whole ground. Nothing, however local or unimportant, is to be omitted. No effort has been spared to perfect a practical analysis conforming to the more usual schemes of classification made in American digests and legal indexes. Every conceivable device seems to have been resorted to for assisting the searcher, such as "scope-notes" showing him what is included under each heading, an analysis, preceding each heading, showing the arrangement of the matter, and, what is very important, citing the section where each heading begins. Cross-references conduct the searcher to other cognate matter in other portions of the book, and the date of each decision is given. The value of having all the decisions on a particular topic in his own State thus grouped together need not be suggested to the judge or practitioner using such a work. Citations are given to the unofficial reports, at least to those of standing and value. It is scarcely to be hoped that, in the first volume, imperfections may not be found; but these will be corrected in subsequent volumes. We do not discover anything in this volume which seems to deserve criticism. It is worthy of the highest praise. It will be a great boon to the

profession. It will greatly assist in the development of and improvement of our American jurisprudence. It is a source of gratification that the work here presented is compiled by a corps of able experts from original sources, and is not stolen from the jurist writers.

**BEACH ON TRUSTS AND TRUSTEES.**—Commentaries on the Law of Trusts and Trustees, as Administered in England and in the United States of America. By CHARLES FISK BEACH, Counselor at Law. In two Volumes. St. Louis: Central Law Journal Company. 1897.

Without some explanation, the author of this work is likely to be confused with Charles Fisk Beach, Jr., under whose name numerous legal treatises have been published, partly, it is known, written by other persons. The author of this work is the father of Charles Fisk Beach, Jr. Perhaps to avoid confusion this fact should have been distinctly stated in the preface. It is inferentially stated in the dedication of the work, which is "to the memory of my father, Fisk Beach, Esquire, late of Hunter, New York, this work, in filial reverence and affection, is dedicated." It would not be at all to the advantage of this work to have the profession suppose that it had been written by Charles Fisk Beach, Jr. To those who know the methods of that vicarious author, his name on the title page of a work means much or little, according to the ability of the person whom he employs to write it. This work, we are told, is written by the father in execution of a contract between the publisher and the son. The author of this work has been by profession a clergyman, and has not been until recently a lawyer, when he was admitted to the bar of Indiana. A statute of that State allows any citizen to be admitted to the bar on giving proof that he is possessed of a good moral character. The fact that a citizen of Indiana is able to subscribe himself "Counselor at Law" therefore really means nothing.

It does not at all follow from these observations that the profession are not to expect in these two volumes a really good and helpful work. Cicero, in one of his orations, said something to the effect that the sciences are all akin to each other. If there are wide gaps here and there between the law and natural justice; if the law in many respects fails to conform to the gospel; if in many respects our human institutions disprove the proposition that all law is from God; if the assertion of certain English judges that the Christian religion is a part of the common law has been measurably overturned and disproved;—yet it must be admitted that there ought to be a close correspondence between the fundamental principles of law and the fundamental maxims of that social morality which derives so great a support from religion. Certainly, then, a professor of the divine law, ought not, by reason of his profession, to be disqualified from being a professor of the human law. One of our best law books, *Speer on Extradition*, was written by a clergyman: a work which has always been held in great respect by the legal profession. Moreover, Mr. Beach in his preface acknowledges his indebtedness to Edward Franklin White, Esq., of the Indianapolis bar, for labor upon the notes and for valuable suggestions in regard to the text; and he pays a high tribute to the legal and critical acumen and to the conscientious industry of his colleague.

This, then, is the work of a new and hitherto unknown author, and it must be judged exclusively upon its merits. It was so judged by one of the ablest

and most critical members of the bench of Missouri before the manuscript went to the printer. He read it from beginning to end, and bestowed upon it unstinted praise, and unhesitatingly advised its publication. We have turned its pages over somewhat in the little time afforded to us for considering it, and all the impressions which we have acquired concerning it are in its favor. In the first place, it is well printed on good, clear white paper and with good, clean and new type. Presenting itself as a stranger at our doors, it therefore comes in the person of a gentleman who pays us the respect of being well dressed: at the very outset this goes in its favor. The publisher pays the legal profession the compliment of presenting them with a work on a great subject in a good and wholesome dress. In the next place, turning to the table of cases, we find that the work carries the citation of the enormous number of nearly 20,000 cases. Turning next to the text, we find that it is written in an agreeable, correct and lawyerlike style. We discover nothing in the easy flow of language and in the accurate use of legal expressions that might not indicate that the writer of this text had been a lawyer all his life. Then, the notes, which we learn from the preface we are to attribute largely to Mr. White, exhibit a thorough digging into the adjudicated cases, an apt grouping of them, and a packing of them together, such as, while not suppressing their meaning, shows what they hold and indicates their relation to the text which they support or qualify. With these observations we conclude all that we are able to say at this time with reference to what is evidently a very able and important work. We hope to be able to refer to it hereafter. We have a feeling that the profession will be glad to know more of the author of it, and will expect something further from his pen on some other title of the law.

**STATE BAR ASSOCIATION REPORTS.**—We have received recently and within the present year, several reports of Bar Associations, which we should be glad to notice at length, because they contain many interesting discussions, as well as able papers upon subjects of interest to the profession. But our space does not allow this, and therefore we merely give the titles of the addresses and papers with the names of the authors.

**ILLINOIS STATE BAR ASSOCIATION.**—Twenty-first Annual Meeting, July 1, 1897. *Legislation in the State and Recommendations in Respect Thereto*, address by John H. Hamline, president. *The End of the Law*, address by Robert E. Hamill. *Progress in the Law During the Victorian Era*, address by Jesse Holdom. *Legal Education*, address by Henry Wade Rogers. *The Bar and the Legislature*, address by George W. Miller.

**IOWA STATE BAR ASSOCIATION.**—Second Annual Meeting, July 29–30, 1896. *Procedure and Methods of the Courts of Final Resort of the Republic of Mexico, the United States of America, and of the Several States and Territories of the Union*, address by L. G. Kinne, president. *The Legal Profession—Its Opportunities and Obligations*, address by John Barton Payne. *The State of Iowa*, address by F. M. Drake. *The City of Davenport*, address by W. H. Wilson. *The Bench*, address by M. J. Wade. *The Advocate*, address by J. J. McCarthy. *The Jury*, address by George W. Wakefield.

**KANSAS STATE BAR ASSOCIATION.**—Fourteenth Annual Meeting, January 20–21, 1897. *The Proposed International Court*, address by David Martin, president. *Abraham Lincoln as a Lawyer*, address by A. Bergen. *An Elective*

*Judiciary*, address by F. D. Mills. *The Other Side of Corporations*, address by J. W. Glead. *Criticism of Courts and Juries*, address by F. L. Martin. *The Devotion of Private Property to a Use in Which the Public has an Interest*, address by Oliver C. Phillips.

NEW HAMPSHIRE.—*Grafton and Co's Bar Association*, Annual Meeting, January 31, 1896. *The Safety of the Republic, the Supreme Law*, address by Harry Bingham, president. *The Law Regulating the Traffic in Intoxicating Liquors: A Historical Review*, address by William H. Sawyer.

OHIO STATE BAR ASSOCIATION.—Annual Meeting, July 20-23, 1897, address by George R. Nash, president. *The Function of the University Law School*, address by Lawrence Maxwell, Jr. *Construction—Some of its Uses and Abuses*, address by F. E. Hutchins.

PENNSYLVANIA BAR ASSOCIATION.—Annual Meeting, June 30 to July 1, 1897. *The Law of Labor and Trade*, address by P. C. Knox, president. *Appellate Jurisdiction*, address by John B. McPherson. *The Jurisdiction of the Justice of the Peace, and the Possible Application in Pennsylvania of the Small Debtors' Court on the English Plan*, address by Thomas Patterson. *The Supreme Court of the United States and its Functions*, address by H. A. Herbert.

VIRGINIA STATE BAR ASSOCIATION.—Annual Meeting, August 3-5, 1897. *Trial of Aaron Burr, for Treason*, address by William Wirt Henry, president. *Leaderless Government*, address by Woodrow Wilson. *Legislation Since the Code*, paper by W. P. McRae.

WEST VIRGINIA BAR ASSOCIATION.—Annual Meeting, November 11-12, 1896. *Are Juries to Judge of the Law as well as the Facts in Criminal Cases*, paper read by P. J. Crogan. *The Logical Conception of a Corporation*, paper read by Benjamin Trapnell. *Reforms in the Administration of Justice*, address of H. D. Peck. *The Jury*, paper read by George E. Price. *Mechanics' Liens in West Virginia*, paper read by S. G. Smith.

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ERRATUM.—On page 806 of this volume, it is stated that Chief Justice Kent issued an attachment for contempt against General Wilkinson. The fact was that he issued the attachment against General Lewis, who commanded a body of troops at Sacket's Harbor, presumably under General Wilkinson.

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